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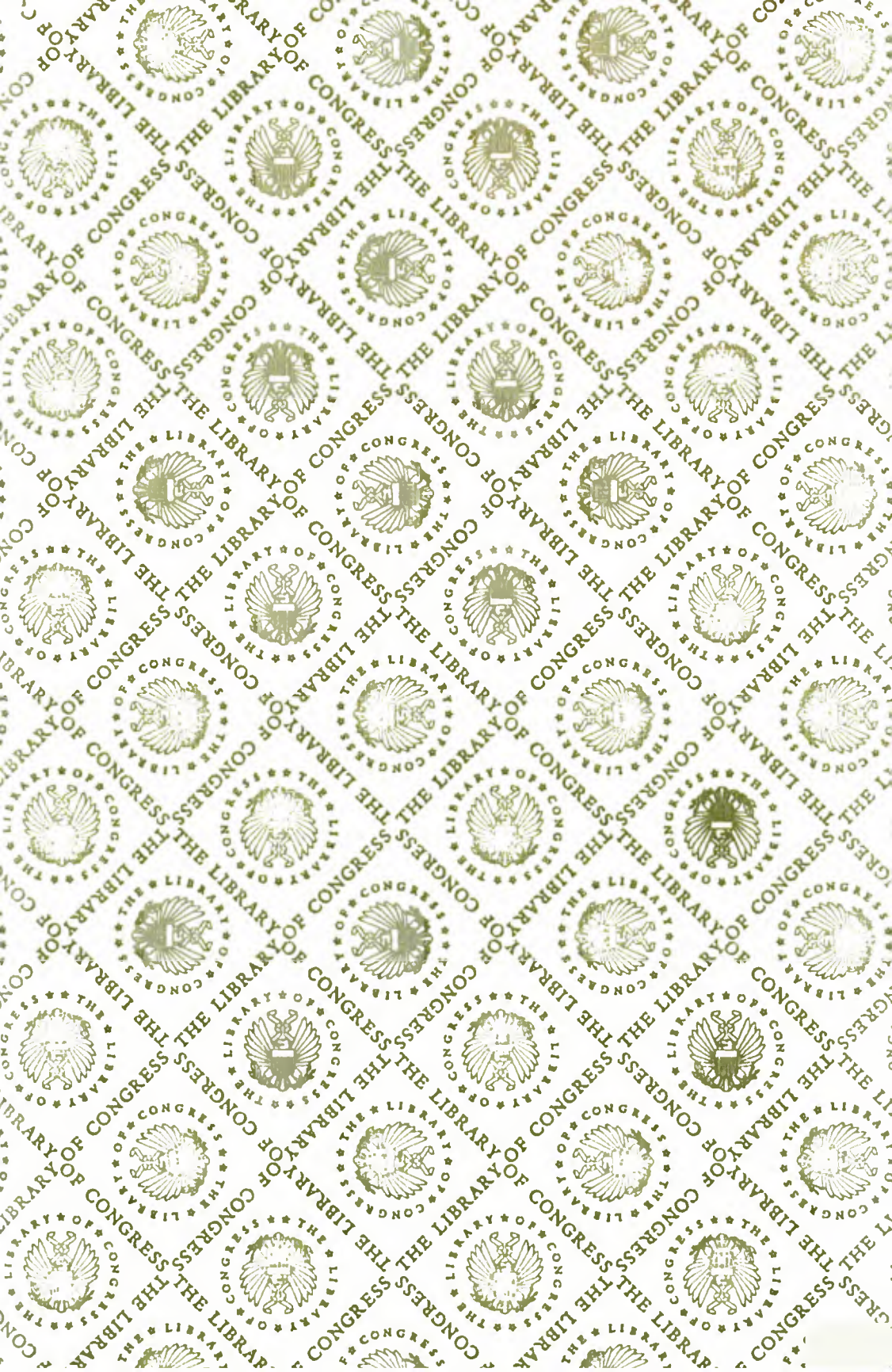
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SMALL BUSINESS LIABILITY REFORM ACT OF 1999

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2366

SEPTEMBER 29, 1999

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WEDNESDAY, SEPTEMBER 29, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10:26 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, George W. Gekas, Howard Coble, Elton Gallegly, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Chris Cannon, James E. Rogan, John Conyers, Jr., Robert C. Scott, and Melvin L. Watt.

Staff Present: Diana Schacht, deputy staff director-chief counsel; Sheila F. Klein, executive assistant to general counsel; Shawn Friesen, staff assistant/clerk; Subcommittee on Commercial and Administrative Law: Ray Smietanka, chief counsel; Jim Harper, counsel; Susan Jensen-Conklin, counsel; and Sarah Zaffina, staff assistant.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. Good morning. Today we will consider H.R. 2366, the Small Business Liability Reform Act of 1999, which was introduced by my good friend and colleague, Jim Rogan. As is apparent from the title of this legislation, it is intended to reform liability rules governing the smallest of small business, those which employ fewer than 25 full-time employees. The 1995 White House Conference on Small Business put legal reform in the top 10 issues for Congress and the President to address. While out of control legal costs and frivolous litigation are problems that impact on every defendant in our tort system, the burden on small business defendants is magnified. The smallest of businesses are more likely to be uninsured or underinsured, which means that one lawsuit puts their economic survival at risk and more prone to being blackmailed in settling frivolous lawsuits because they often can't afford the cost of defending the case in court. Vindicating the small business against false claims will require many, if not most, of its employees to turn their efforts from running the business to defending the case. This diversion of resources, both financial and human, away from productive uses impacts disproportionately on small business and their continued viability.

I certainly look forward to hearing from our panel on how H.R. 2366 would address the unique concerns about our tort system that

have been expressed by the small business community. But I will first yield to the ranking minority member, Mr. Conyers, and then to Mr. Rogan, the bill's sponsor, for opening statements. Without objection, the written statement of any other member will be included in the record. I am pleased to yield to Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I am very glad that we were able to get witnesses from Public Citizen, Tom Bantle, and the president of the American Trial Lawyers Association, Richard Middleton, and Professor Ralph Estes to come and join all of the witnesses today because we are beginning to get suspicious of this tort reform stream of legislation and proposals that seem to be more concerned about protecting possible wrongdoers instead of protecting actual victims.

Now, this bill and other forms of tort reform have been considered during this Congress. Its predecessors are the class action bill, the statute of repose bill, and some others that reveal—I don't want to say that the majority agenda is just to bail out corporate defendants. That is maybe a little bald. But it is something like that. It is like consumers' rights and States' rights are to be minimized. And so I just wonder about the justification for this. I am sure small businessmen are put in particular peril, but in this bill we go beyond that. We change whole sections of the law that aren't just limited to small businesses.

This bill provides that products sellers, renters, and lessors, regardless of size, may only be subject to product liability suits under three limiting conditions.

Now, under the theory of strict liability available to plaintiffs in most States, an injured plaintiff may prove the case by showing that the manufacturer or retailer breached their duty to provide safe products and that this breach caused the plaintiff's injury. The rationale is that it is more fair for manufacturers and retailers to bear the burden of the product failure than it is to impose the burden upon an injured person since the manufacturer is in a better position to identify whether the product is dangerous and spread the cost of inherently dangerous products.

This bill, as I read it, would eliminate strict liability and thereby severely limit the plaintiff's possibility for full recovery for injuries due to defective products. So I think you get the drift here, that this is part of a stream of proposals that continue to bail out corporate defendants. It is supposed to be for little ones here, but we just add on a provision that goes right across the board. I don't think this is the right way to proceed, but I will be looking forward to the testimony and hope that we can come to a reasonable conclusion as to what to do with this bill.

Thank you, Chairman Hyde.

Mr. HYDE. Thank you, Mr. Conyers. Mr. Rogan, the chief sponsor of the bill.

Mr. ROGAN. Mr. Chairman, thank you for holding this hearing. I also want to thank my friend and colleague from Michigan for his comments, which are always interpreted by me to be both sincere and constructive. I want to thank all of the witnesses for giving us their time this morning. I especially want to welcome to the committee Richard Dinger. Richard is both my friend and constituent, who in addition to his full-time job as the owner and president of

Crescenta Valley Insurance, serves as president of the Montrose-Verduga City Chamber of Commerce. I am grateful that Richard has been willing to take time away from his business and family to come across the country to share his knowledge and views with us today.

Mr. Chairman, I introduced the Small Business Liability Reform Act of 1999 this past summer along with our colleagues, Mr. Holden of Pennsylvania, Mr. Moran of Virginia, and Mr. Burr of North Carolina. Its provisions are designed to improve the fairness of the civil justice system, to enhance its predictability, and squeeze wasteful excessive costs from the system by reducing unnecessary litigation. In H.R. 2366, my colleagues and I have attempted to approach this goal in an incremental and pragmatic way by focussing on a few narrowly crafted reforms that have bipartisan support in recent years and can be pursued on a bipartisan basis now.

For the smallest of America's small businesses, those with fewer than 25 full-time employees, section 104 of the bill only limits punitive damages that may be awarded against a small business to the lesser of three times the claimant's compensatory damages or $250,000 in cases where the claimant shows by clear and convincing evidence that the defendant engaged in particularly egregious misconduct. It does nothing to diminish the claimant's general right to sue for economic and noneconomic losses such as lost wages, medical bills, pain and suffering, and similar provisions.

Similarly, section 104 of the bill provides that small businesses shall still be liable under the old rules of joint and several liability for all economic damages such as lost earnings, lost benefits, medical expenses, and so forth. Small businesses would also be liable for noneconomic damages in proportion to their responsibility for causing a claimant's harm. As such, our bill borrows from the California model enacted overwhelmingly by referendum in 1986 which abolished joint liability for these kinds of damages.

Title II of our bill is very simple and straightforward. It does nothing to change the current product liability rules respecting the manufacturer of a product. It provides that product sellers, other than manufacturers, would be liable in product liability cases only when they are responsible for the claimant's harm. However, if the manufacturer is not subject to judicial process or is judgment proof, the bill would also allow sellers to be sued under current rules. This protects innocent claimants from finding no redress if they are harmed. It simply focuses liability on the party where it is most appropriately targeted.

Mr. Chairman, these issues are familiar to many of our committee colleagues. In the 104th Congress the House passed legislation, including similar and more broadly applied punitive damages and joint liability reforms as well as the product seller liability standard. More recently provisions similar to the latter two were included in product liability legislation debated in the Senate during the 105th Congress, which President Clinton has apparently agreed to sign if given the opportunity. Further, title I's joint liability reforms borrow from those enacted in the 105th Congress as part of the Volunteer Protection Act of 1997.

Mr. Chairman, the central purpose of H.R. 2366 is to reduce needless frivolous litigation that unfairly burdens and even cripples smaller businesses across our country and from wasteful legal costs that go hand in hand with it. I look forward to the witnesses' discussion of these issues.

Mr. Chairman, thank you again for holding this hearing. And if I may just make an aside, regrettably I do have a markup down the hallway. It may be necessary at times during this hearing for me to slip out of the room. If I do so, I hope that the members of the committee and the panel and the witnesses will accept my apologies and I will return as quickly as possible. Thank you, I yield back my time.

Mr. HYDE. Thank you, Mr. Rogan. Our panel presentation will begin with Richard E. Dinger, who as we have heard is the owner and president of Crescenta Valley Insurance. He is testifying today on behalf of the Independent Insurance Agents of America.

Our next witness will be David Harker, president and CEO of Excalibur Exploration, Inc., a small oil and gas exploration company based in Ohio. Mr. Harker holds a Bachelor's and Master's Degree in geology from Kent State University.

Sharon Faulkner is the regional manager for Premier Rental Car in Albany, New York. Premier is a subsidiary of Budget Rent a Car Corporation.

We will then hear from Tom Bantle, legislative counsel at Public Citizens Congress Watch. Congress Watch monitors Congress and works for consumer rights, government and corporate accountability, and similar issues.

George Keeley appears this morning on behalf of the National Association of Wholesale-Distributors. He is an attorney practicing in the areas of product liability counselling and defense for wholesaler dealers.

Richard Middleton, Jr., is the president of the Association of Trial Lawyers of America as well as a practicing attorney who represents injured consumers, and very successfully, I might add.

Ralph Estes holds the title of accounting professor emeritus at the American University in Washington, D.C., and is also a past President of Accountants for the Public Interest.

Our final witness will be Roger R. Geiger, executive state director for the National Federation of Independent Business in Ohio. NFIB is a nonprofit business and professional organization designed to promote the economic, financial, and nonpartisan political welfare of the independent small businesses owners.

Welcome to all of you. Your written testimony will be placed in the record in its entirety. I urge that you confine your oral presentation to 5 minutes each if you possibly can. We won't be strict disciplinarians, but we hope that you realize there are a lot of witnesses who want to testify. So we appreciate your trying to hold it to 5 minutes.

We will begin with Mr. Dinger. Mr. Dinger.

Would you pull the mike a little closer to you, thank you.

STATEMENT OF RICHARD E. DINGER, PRESIDENT, CRESCENTA VALLEY INSURANCE, ON BEHALF OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA

Mr. DINGER. I will turn it on, too. I believe that I bring to the committee three unique perspectives. First, I am the president of my local chamber of commerce and familiar with small businesses in the area and their problems; second, I am a business owner myself; and, third, as an independent insurance agent, I work with small business to help reduce their liability exposure through the purchase of insurance. I know firsthand the problems we as small businesses face and what is being done to manage the risk. Small business is the life blood of our economy and the foundation on which the United States has grown. However, as chamber president, it is troubling when I hear small businessmen and women questioning whether it is worth the trouble of running their small business.

They are not referring to business concerns or the competition of slow market growth, but the legal uncertainly that at any given time their small businesses can be sued or threatened with legal actions for something beyond their reasonable control. I believe the following example best illustrates my point. In Montrose, California, a gentlemen has been selling motorcycle accessories for almost 25 years. Two years ago a customer asked the shopowner for his advice regarding motorcycle forks. The owner is an advanced motorcycle rider and has been riding motorbikes almost his entire life. Upon recommendation, the customer purchased the forks and gave them to his brother. The brother, unfortunately, had an accident and injured his neck, blaming the accident on the motorcycle forks. The injured rider brought action against both the manufacturer of the motorcycle part and the local shop. The shop owner had no other choice but to retain counsel.

Over the next several months, the owner was subjected to three depositions lasting 5 hours each and spent numerous hours in phone conversations with his lawyer and the manufacturer's lawyer. Despite the unlikelihood the shopowner would be held directly responsible for the accident, he was nevertheless instructed to document all of the conversations to protect his personal interests. In all he estimates he spent well over 100 hours dealing with this matter at personal financial expense and many sleepless nights wondering if his life's work would remain intact to support his family. In the end, the biker was fine and the lawsuit was settled out of court.

As I previously stated, I am an insurance agent and own my own small business. Agents are faced with a somewhat different type of liability specific to our role as professional risk counselors and risk management product providers. Commonly referred to as errors and omissions coverage, agents rely on this risk management tool in the event an insurance policy is incorrectly written or more likely when a policyholder believes they contracted for more insurance coverage than received after a loss. The latter situation is particularly troubling because often the agent fully informed the client of their insurance coverage options and the level agreed upon. There is a tendency to lay blame on the insurance agent when the claims do not meet expectations, but what that would suggest is that as

an agent dealing with risk management products, I am the guarantor of all levels of coverage I sell and service. This is not an assumption of risk I can afford, particularly when individuals are allowed to bring frivolous suits. If I make an error on a policy to the detriment of my client, then I should be held responsible; but a line must be drawn which rationally assigns responsibility and allows for reasonable expectation of exposure.

Mr. Chairman, as an independent insurance agent who sells commercial liability insurance to small businesses, my testimony creates a personal dilemma. I come before you in strong support of H.R. 2366 with the hope that in time small businesses will not be forced to dedicate such large shares of their limited resources toward protection against unpredictable liability. Such relief could mean the difference in hiring more employees or expanding business locations. However, as an insurance agent, the higher the cost of liability insurance I provide the greater my commission for that policy. Would I trade selling a less expensive policy to ensure the small business can afford to stay in business? I would. The reality is I cannot sell insurance to an entity that ceases to exist.

Mr. Chairman, we all know individuals who have started their own businesses or carry on family owned businesses. There are small businesses that sponsor little league teams, provide jobs, and anchor our local tax base. The community loses as a whole when they must bear the cost of burdensome and unnecessary liability.

I would like to briefly touch upon the subject of insurance rates as they relate to enactment of this legislation. Once again, I am just an insurance agent. I am not a company underwriter.

There is an expectation that small business liability reforms once it is signed into law would lower premiums. I cannot guarantee that at this time, Mr. Chairman, but I do believe that over time the reforms will help reduce prices.

Mr. Chairman, in closing I would like to reiterate my strong support for the needed reforms of this bill, first, to men and women who earn their livelihood on Main Street, USA. This measure does not shut off people's ability or limit a plaintiff's ability to sue a small business for acts of negligence or any other act. It is a rational target approach to the problem.

I once again thank you, Mr. Chairman, for allowing me to share my views with the committee on this issue. Please note the Independent Insurance Agents of America and more than 300,000 agents and agent employees stand ready to assist you in moving this bill through the legislative process. I will do my best to answer any questions the committee members have. Thank you.

[The prepared statement of Mr. Dinger follows:]

PREPARED STATEMENT OF RICHARD E. DINGER, PRESIDENT, CRESCENTA VALLEY INSURANCE, ON BEHALF OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA

Mr. Chairman, members of the committee, my name is Richard E. Dinger and I am the President of Crescenta Valley Insurance, an independent insurance agency located in Glendale, California. I appreciate this opportunity to come before you today to discuss small business liability reform on behalf of the Independent Insurance Agents of America.

I believe I bring to the committee three unique perspectives: first, I am the President of my local Chamber of Commerce and am very familiar with the small businesses in the area and their problems; second, I am a small business owner myself; third, as an independent insurance agent, I work with small businesses to help re-

duce their liability exposure through the purchase of insurance. I know first hand the problems we as small business owners face and what is being done to manage this risk.

Small businesses are the lifeblood of our economy and the foundation on which the United States has grown. However, as Chamber President, it is troubling when I hear small business men and women question whether or not the "trouble" of running their businesses is worth it. They are not referring to business concerns over competition or slow market growth, but the legal uncertainty that at any given time, their small businesses can be sued or threatened with legal action for something beyond their reasonable control. I believe the following example best illustrates my point.

In Montrose, California a gentleman has been selling motorcycle accessories for almost twenty five years. Two years ago a customer asked this shop owner for his advice regarding motorcycle forks. The owner is an advanced motorcycle rider and has been riding motor bikes his entire life. Upon recommendation, the customer purchased the forks and gave them to his brother. The brother unfortunately had an accident and injured his neck, blaming the accident on the forks. The injured rider brought action against both the manufacturer of the motorcycle part, and the local shop. The shop owner had no other choice but to retain counsel.

Over the next several months, the owner was subjected to three depositions lasting five hours each, and spent numerous hours in phone conversations with his lawyer and the manufacturer's lawyers. Despite the unlikelihood the shop owner would be held directly responsible for the accident, he was nevertheless instructed to document all conversations to protect his personal interests. In all, he estimates that he spent well over a hundred hours dealing with this matter—at personal financial expense—and many sleepless nights wondering if his life's work would remain in tact to support his family. In the end, the biker was fine and the lawsuit was settled out of court.

The store owner, who is an insured client of mine, is left with a bitter taste of the current legal system. He believes it is absolutely ridiculous to expect that he, as the shop owner, can personally inspect and test the over ten thousand parts his store carries at any given time. The part in question had an excellent reputation for quality and, in fact, the owner used the product himself. In the wake of these types of accidents, one of the first questions asked is how much liability insurance does the small business owner carry. The insured shop owner wondered if he would be less of a litigation target if the claimant and his lawyers knew up front the shop had very little insurance coverage. The owner is put in a precarious position. If he carries less insurance coverage, he exposes his business to everyday risks that are otherwise foreseeable, and therefore, manageable. On the other hand, if he is responsible and carries adequate coverage, he may be a greater litigation target because his participation in the suit could lead to a large indemnity pay-out. Business owners like him operate as responsible professionals, but commercial liability is a considerable expense, as are the labor hours missed and attorney fees necessary to protect his shop.

As I previously stated, I am an insurance agent and own my own small business insurance agency. Agents are faced with a somewhat different type of liability specific to our role as professional risk counselors and risk management product providers. Commonly referred to as "Errors and Omissions" coverage, agents rely on this risk management tool in the event an insurance policy is incorrectly written, or more likely, when a policy holder believes they have contracted for more insurance coverage than received after a loss. The latter situation is particularly troubling because often the agent fully informed the client of their insurance coverage options and the level agreed upon. There is a tendency to lay blame on the insurance agent when claims do not meet expectations, but what that would suggest is that, as an agent dealing in risk management products, I am the guarantor of all levels of coverage I sell and service. That is an assumption of risk I cannot afford, particularly when individuals are allowed to bring frivolous suits. If I make an error on a policy to the detriment of a client, then I should be held responsible. But a line must be drawn which rationally assigns responsibility and allows for reasonable expectation of exposure.

Mr. Chairman, as an independent insurance agent who sells commercial liability insurance to small businesses, my testimony creates a personal dilemma. I come before you in strong support of H.R. 2366, with the hope that, in time, small businesses will not be forced to dedicate such large shares of limited resources to protect against liability. Such relief could mean the difference in hiring more employees or expanding business locations. However, as an insurance agent, the higher the level of liability insurance I provide, the greater my commission for that policy. Would I trade selling higher amounts of liability insurance to small businesses for the cer-

tainty that my insureds will not lose their businesses? I would. The reality is I cannot sell insurance to an entity that ceases to exists. Mr. Chairman, we all know individuals who have started their own businesses or are carrying on family traditions. These are the small businesses that sponsor our local little league teams, that provide jobs, and anchor the local tax base. The community loses as a whole when they must bare the costs of burdensome and often unnecessary liability.

I would like to briefly touch on the subject of insurance rates as they relate to the enactment of this legislation. Once again I stress that I am an insurance agent and not an insurance company underwriter. There is an expectation from many that if small business liability reforms are signed into law then consumers will see lower premium rates shortly thereafter. I am not prepared to make that kind of guarantee to your committee, Mr. Chairman. I do believe that over time, if the reforms enacted contribute to a trend of declining claim payments with all other factors remaining constant, premium rates could decrease. Remember, insurance premiums are based primarily on expected claim payments, which in turn are primarily based on actual claim payments and historical trends. Further, there are other factors such as interest rates and return on investment income that may affect pricing, as well competition among companies and the individual risk portfolios each company carries. What H.R. 2366 does provide is greater consistency and predictability in dealing with small business liability risk.

Mr. Chairman, in closing, I would like to reiterate my strong support for the needed reforms this bill offers to the men and women who earn their livelihood on Main Street. The measure does not shut off people's ability to sue or limit a plaintiff's ability to sue a small business for an act of negligence or any other act. It is a rational, targeted approach to a problem that only continues to grow.

I once again thank you Mr. Chairman for allowing me to share my views with the Committee on this issue. Please know the Independent Insurance Agents of America and their more than three hundred thousand agents and agency employees stand ready to assist you in moving this bill through the legislative process. I will do my best to answer questions the committee members may have. Thank you.

Mr. HYDE. Thank you very much. Mr. Harker.

STATEMENT OF DAVID HARKER, PRESIDENT AND CEO, EXCALIBUR EXPLORATION, INC.

Mr. HARKER. Mr. Chairman, distinguished members of this committee, my name is David Harker and I am from Hartville, Ohio. I would like to thank you today for this opportunity to share experiences that, as a small business owner, I believe are relevant to the committee's work on legal reform.

I am the owner of Excalibur Exploration. It is a small independent oil and gas exploration company operating exclusively in my home State of Ohio. My company directly employs four people but provides indirect employment for dozens more for services and subcontractor work. I am a member of the National Federation of Independent Business, and I am honored today to present this testimony on behalf of its 600,000 small businesses owners.

Mr. Chairman, I have often read newspaper articles about the flood of frivolous lawsuits that plague small business owners across America. But until recently I have been fortunate to have avoided this situation. However, I now find myself involved in the middle of a frivolous lawsuit, the likes of which I thought I would only read about in the papers. My company has recently been sued due to an inadvertent entry upon a piece of property in a rural area of Ohio. The plaintiff was in negotiation with my company to enter into a lease agreement to incorporate their property into a larger drill unit. We were to utilize their lands for legal well spacing and for a pipeline. The plaintiff had already agreed in principle to the basic terms of a nondrill lease, but wanted a surveyor's plat as an exhibit showing the location of the pipeline included with the lease.

The plaintiff left the location of this pipeline to my discretion and told me on more than one occasion that I should not worry about our ongoing drilling program on the neighboring properties because the plaintiff would not interfere with our pipeline construction. I hired surveyors to flag the pipeline as requested on the plaintiff's properties and to identify the drill unit boundaries. The surveyors left flags marking both the proposed pipeline right-of-ways and various well sites.

Unbeknownst to me, a surveyor decided without informing anyone else to change the flag trail route to one of these locations for his own convenience. I assumed the surveyor had proceeded as we discussed and I directed over the telephone a second subcontractor to follow the surveyor's flags to build this location. In doing so, he followed a different set of flags to the wrong location and inadvertently crossed upon the plaintiff's property, removing about 6 to 8 inches of topsoil and some brush along a 400 by 12 foot strip.

We could have just repaired it and never mentioned it to the landowner. He probably would never have known as his house is 2100 feet away and the disturbed area is invisible from all roadways. Instead, I immediately contacted the property owner, took him back to the area and explained what had happened. We did not disturb any trees and basically treated the property exactly as we needed to build the proposed pipeline with the exception it was in a slightly different spot than we had surveyed. I told him that we could utilize this now new cleared path for the pipeline and this way he knew exactly where the pipeline was in the physical world rather than just on a surveyor's plat. I also offered to pay for the damage at my own expense. He didn't have much to say at this time and a few days later he conveyed to me he was not going to sign the lease agreement and I would be hearing from his attorney.

On January 21, I received a letter saying cease and desist using the plaintiff's property. I called their attorney hoping he would be a reasonable person and we could reach some agreement on this matter. After speaking to his client, his response was unimaginable. The plaintiff now demanded $20,000 in damages. I couldn't believe my ears. I would later know for a fact that the damages were really only estimated at $200. In fact, I have a number of different estimates with me from different subcontractors to repair the damage. Upon notifying the original contractor, he also offered to repair the damage at his own expense. This, however, was not enough.

The plaintiff has now gone so far as to sue us for $100,000 in damages of which $50,000 is punitive damages. Keep in mind, this incident involved mistakes by various parties that resulted in real damages of $200. This damage is easily repaired. We have to do similar reclamation on every well and pipeline well we install. I don't see the relationship between $200 in reclamation costs and the $100,000 the plaintiff is requesting.

I didn't try to dodge responsibility even though I didn't feel totally at fault. We should, when we cross the property. Why should I then be held totally liable for the action of numerous parties?

This issue also does not merit the court's time as the entire episode could have been handled on a handshake. Instead plaintiff saw this as an opportunity to hit the legal lotto game. The threat of this kind of action and the resulting costs of defense have

brought me to Washington today in the hopes that other small businesses will not have to endure a similar plight that unfortunately continues for my small company under our current legal system.

Mr. Chairman, I commend the committee for looking seriously at this problem and hope that this is the year small business owners will be freed from this predatory system. Small businesses need your help now. Please change these laws for the benefits of small business owners everywhere and help restore some common sense to our legal system.

Thank you.

[The prepared statement of Mr. Harker follows:]

PREPARED STATEMENT OF DAVID HARKER, PRESIDENT AND CEO, EXCALIBUR EXPLORATION, INC.

SUMMARY

I have been invited to testify due to the fact that I am an independent entrepreneur who is being victimized by a frivolous lawsuit by a predatory Plaintiff who has seen an opportunity to extort money from my company due to a most minor infraction.

Subcontractors working for my company inadvertently entered upon a remote portion of the Plaintiff's property in rural Ohio while building roads to oil and gas well sites that we were in the process of drilling. Unbeknownst to me, a surveyor decided—without informing anyone else—to change a flag trail route for his own convenience. I assumed the surveyor had proceeded as we had discussed and I directed over the telephone a second subcontractor to follow the surveyor's flags to build this location. He followed a different set of flags to the wrong location and inadvertently crossed upon the Plaintiff's property, removing about 6" to 8" of topsoil and some brush along a 400' by 12' strip. We have subsequently gotten multiple bids of approximately $200.00 to repair the disturbed area and I offered to do so at my expense. The Plaintiff, who was in negotiations with us to enter into a Non-Drill Lease Agreement and provide us with a pipeline right-of-way, went ballistic and somehow thought this was a $100,000.00 windfall for him and brought a suit against my company. $200.00 actual damages, $100,000.00 imaginary damages, yet I have to pay to defend myself and he has no disincentive for tying up the courts for something that reasonable human beings could have settled easily with a handshake that same afternoon. Besides, the disturbance we caused was exactly what would have happened building the pipeline through his property and I offered to put it exactly where this disturbance occurred. He of course refused.

Mr. Chairman, I commend this Committee for looking seriously at the problem of lawsuit abuse, and hope that this is the year small business owners will gain freedomfrom this predatory system.

Mr. Chairman and distinguished members of this committee, my name is David Harker and I am from Hartville, Ohio. I would like to thank you today for this opportunity to share experiences that, as a small business owner, I believe are relevant to the committee's work on legal reform. I am the owner of Excalibur Exploration, Inc., a small independent oil & gas exploration company operating exclusively in my home state of Ohio. My company directly employs four people, but provides indirect employment for dozens more through services and subcontractor work. I am a member of the National Federation of Independent Business (NFIB) and am honored to present this testimony on behalf of its 600,000 small business owners. Mr. Chairman, I have often read newspaper articles about the flood of frivolous lawsuits that plague small business owners across America, but until recently, I have been most fortunate to have avoided this situation. However, I now find myself involved in the middle of a frivolous lawsuit; the likes of which I thought I would only read about in the papers.

My company has recently been sued due to an inadvertent entry onto a piece of property in a rural area of Ohio. The Plaintiff was in negotiation with my company to enter into a lease agreement to incorporate their property into a larger drill unit. We were to utilize their lands for legal well spacing and for a pipeline. The Plaintiff had already agreed in principle to the basic terms of a "Non-Drill Lease," but wanted a surveyor's plat as an exhibit showing the location of the pipeline included with the lease. The Plaintiff left the location of this pipeline to my discretion. The Plain-

tiff also told me on more than one occasion that I should not worry about our ongoing drilling program on the neighboring properties because the Plaintiff would not hold up our pipeline construction. I hired surveyors to flag the pipeline as requested on the Plaintiff's properties and to identify the drill unit boundaries. The surveyors left flag trails marking both the proposed pipeline right-of-way and also flag trails to various well sites.

Unbeknownst to me, a surveyor decided—without informing anyone else—to change a flag trail route for his own convenience. I assumed the surveyor had proceeded as we had discussed and I directed over the telephone a second subcontractor to follow the surveyor's flags to build this location. He followed a different set of flags to the wrong location and inadvertently crossed upon the Plaintiff's property, removing about 6" to 8" of topsoil and some brush along a 400' by 12' strip.

We could have just repaired it and never mentioned to the landowner what had occurred. He most likely would have never known, as his house is 2100' from this area and the disturbed area is invisible from all roadways. Instead, I immediately contacted the property owner, took him back to the area and explained what had happened. We did not disturb any trees and basically treated the property exactly as we needed to build the proposed pipelines (with the exception that it was located in a slightly different spot than we had surveyed). I told him that we could utilize this cleared path for the pipeline and this way he knew exactly where the pipeline was in the physical world rather than just on a plat. I also offered to pay for the damage at my own expense. He didn't have much to say at this time and a few days later he conveyed to me that he was not going to sign the lease agreement and that I would be hearing from his attorney.

On January 21, 1999, I received a letter saying to Cease and Desist using the Plaintiff's property. I called their attorney hoping he would be a reasonable sort of guy and could help negotiate the final lease agreement. He said he would speak with his clients. His response was that his clients wanted $20,000.00 in damages. I couldn't believe my ears! I would later know for a fact that the damages were only estimated at $200 (Exhibit 1). Upon notifying the original contractor, he offered to repair the damage at his own expense. This however, was not enough.

The Plaintiff has now gone so far as to sue us for $50,000.00 in damages and $50,000.00 in punitive damages. Keep in mind, this incident involved mistakes by various parties that resulted in real damages of $200.00. On the very first day of the disturbance, I offered to repair the damage at my own expense. I didn't try to dodge responsibility even though I didn't feel legally responsible since neither I nor my own employees drove the bulldozer that crossed the property. Why then should I be held totally liable for the action of numerous parties? The threat of this kind of action and the resulting costs of a defense have brought me to Washington to ask for your serious consideration of small businesses like mine which are targets for a legal system gone awry.

Mr. Chairman, I commend this Committee for looking seriously at this problem, and hope that this is the year small business owners will gain freedom from this predatory system. Small businesses need your help now. Please change these laws for the benefit of small business owners everywhere and help restore some common sense to our legal system.

Exhibit C

Wellhead Production & Maintenance, Inc.

1714 Boardman-Poland Road, Suite E, Poland, Ohio 44514 Phone:(330) 707-0305 Fax:(330) 707-0570

Estimate

DATE	ESTIMATE NO.

NAME / ADDRESS

Excalibur Exploration
9720 Cleveland Avenue
Greenville, OH 44630

330-466-7088

PROJECT

DESCRIPTION	QTY	RATE	TOTAL
Dump Truck	1	35.00	35.00
D-5 Dozer	2	45.00	90.00
Laborer	2	20.00	40.00
To Remediate the disturbed lease road on the property in Madison Township, Lake County, Ohio.			

TOTAL $165.00

SIGNATURE Ed Cole

Field Location: 13010 State Route 88, Garrettsville, Ohio 44231 Phone: (330) 527-2430 Fax: (330) 527-2430

Exhibit C

Turbo Excavating and
Pipeline Construction

33868 Winona Rd., Salem, Ohio 44460 - (330) 222-1271

ESTIMATE

Location: Lake County

Close up drive way cut in by Excaliber

Dozer time $ 200.00

Mr. HYDE. Thank you, Mr. Harker. Ms. Faulkner.

STATEMENT OF SHARON FAULKNER, REGIONAL MANAGER, PREMIER RENTAL CAR

Ms. FAULKNER. Good morning, Mr. Chairman and members of the committee. My name is Sharon Faulkner and I am the area manager for Premier Car Rental in Albany, New York. Premier is a subsidiary of Budget Rent a Car Corporation. Thank you for inviting me to appear at this hearing today.

My testimony is in support of title II of H.R. 2366, the Small Business Liability Reform Act of 1999. I thank Congressman Rogan for introducing this important legislation and urge this committee to approve this bill in the near future. Specifically, I urge this committee to support section 204 of this bill, which would reform the laws of a small handful of States concerning the liability of companies that rent or lease products.

Let me tell you about my own personal experience which I hope will help the members of this committee understand the importance of section 204 of this bill. Seventeen years, until 1997, I was a small business owner operating an independent car rental company in upstate New York. The company, Capitaland Rent a Car, was headquartered in Albany. During those years, thanks to the hard work of my employees and the loyalty of local customers, my company survived two recessions and fierce competition.

That situation changed one day in 1997 when I was notified that I and my company were being sued for an accident involving one of my rental cars that occurred over a year previously. Capitaland had rented a car in 1996 to a female customer who possessed a valid New York driver's license. As part of Capitaland's standard rental agreement, the customer agreed that she would be the only driver of the car. My customer then loaned the car to her son who was an unauthorized driver under the rental agreement. The renter's son, without her knowledge, drove the car to New York City.

It was involved in an accident in which a pedestrian was struck in a crosswalk. The injured person sued our company for the son's negligence in causing the accident.

This lawsuit caught me completely by surprise because when I checked my records, I found that the rental vehicle had been returned to us without any damage. As a result, I had no idea that an accident had ever occurred or that a person had ever been injured. Nevertheless, Capitaland was named as a codefendant in the lawsuit, which demanded enormous amounts of money to pay medical bills and compensate the injured person for his pain and suffering.

You might wonder how it is that my company was sued for the accident. We rented to a licensed driver, the renter loaned the car to an unauthorized driver. It was the unauthorized driver, a person that neither I nor any of my employees ever had a chance to meet, that caused the accident that injured the pedestrian. We weren't negligent in any way and I could not have prevented the accident from occurring.Therefore, how could I be liable?

However, New York is one of a very small minority of States that hold the companies that rent motor vehicles liable for the negligence of persons who drive their vehicles whether that person is a customer or not. In these States a car rental company can be assessed unlimited damages by a court under the legal doctrine of vicarious liability if one of its cars is involved in an accident in which the driver of the car was negligent. Simply because we owned the car, New York law held my company liable for the negligence of the renter.

For me this lawsuit was a final straw. I am a mother with three children and Capitaland was our sole means of support. I found it incredible that I could lose everything I had worked to achieve for 17 years because of an accident for which I wasn't at fault. In effect, every time I rented a car to a customer I was putting my family's future on the line in the hope that the customer did not drive the car negligently and cause an accident.

So I made the decision to sell my company, the assets of which were purchased by a company that is now Budget Rent a Car. All of my employees were laid off and another independent car rental company disappeared in New York. My company isn't alone. Capitaland is one of over 300 car rental companies that have closed in New York since 1990.

Unlimited vicarious liability for car rental companies exist in only five States: Connecticut, Iowa, Maine, New York, and Rhode Island, and the District of Columbia.

Vicarious liability for companies that rent or lease motor vehicles is unfair and contrary to one of our Nation's fundamental pillars of justice, that a person should be held liable only for harm that he or she causes or could have prevented in some way. For the car rental industry, vicarious liability increases rates for all of our customers, not just for customers in the small minority of States that adhere to this unfair and outmoded doctrine.

I could give you many examples of this unjust and unfair legal doctrine. Together these cases result in over $100 million in judgments and settlements against car rental companies every year, costs that must be recovered by the companies through the rates

that they charge to every customer. So in effect, these judgments affect States not just where it is, but citizens of all vicarious liability States.

Section 204 of H.R. 2366 will put a stop to this legal lottery. This provision will preempt State vicarious liability laws that hold companies that rent or lease motor vehicles for the negligence of the renters or drivers.

Let me take a minute to tell you what it will not do. This section will not shield the car rental company from its own negligence or for failing to maintain that car properly. This provision will not shield a car rental company from potential liability if it rents a car to a person who is intoxicated or if that person then causes an accident. That is negligence and this provision will not prevent any action based upon the negligence of the car rental company. In addition, it will not impact on any requirement that the car rental company insure the vehicles at the level required by State law. So I urge this committee to pass H.R. 2366, with section 204 included, as quickly as possible. While it is too late to help my former company, it is not too late to put a stop to this legal lottery in the future.

I would be pleased to answer any questions.

[The prepared statement of Ms. Faulkner follows:]

PREPARED STATEMENT OF SHARON FAULKNER, REGIONAL MANAGER, PREMIER RENTAL CAR

Good morning, Mr. Chairman and members of the Committee. My name is Sharon Faulkner, and I am the regional manager for Premier Car Rental Company in Albany, New York. Premier is a subsidiary of Budget Rent A Car Corporation.

Thank you for inviting me to appear at this hearing today. My testimony is in support of Title II of H.R. 2366, the "Small Business Liability Reform Act of 1999." I thank Congressman Rogan for introducing this important legislation, and urge this Committee to approve this bill in the near future. Specifically, I urge this Committee to support Section 204 of H.R. 2366, which would reform the laws of a small handful of states concerning the liability of companies that rent or lease products.

Let me be very clear about what this bill would and would not do. This bill would right a wrong by adopting a uniform federal standard that would not hold motor vehicle rental companies liable for damages when the companies in no way caused an accident. The bill would not, however, eliminate the liability of the companies when they are negligent or failed to maintain the vehicle properly.

Let me relay my personal experience to you, which I hope will help the members of this Committee understand the importance of Section 204 of this bill. For 17 years, until 1997, I was a small business owner, operating an independent car rental company in upstate New York. The company, Capitaland Car Rental, Inc., was headquartered in Albany. During those years, thanks to the hard work of my employees and the loyalty of our local customers, my company survived two recessions and fierce competition from the larger, nationwide car rental companies.

That situation changed one day in 1997, when I was notified that I and my company were being sued for an accident involving one of our rental cars that had occurred over a year previously. Capitaland had rented a car in 1996 to a female customer who possessed a valid New York driver's license. As part of Capitaland's standard rental agreement, the customer agreed that she would be the only driver of the car. Our customer then loaned the car to her son, an unauthorized driver under the rental agreement. Our renter's son, without her knowledge, drove the car to New York City and was involved in an accident in which a pedestrian was struck in the crosswalk. The injured person sued our customer's son for his negligence in causing the accident.

This lawsuit caught me completely by surprise, because, when I checked our records, I found that the rental vehicle had been returned to Capitaland without any damage. As a result, I had no idea that an accident had occurred or that a person had been injured.

Nevertheless, Capitaland was named as a co-defendant in the lawsuit, which demanded enormous amounts of money to pay medical bills and compensate the injured person for his pain and suffering.

You might wonder how it is that my company was sued for this accident. We rented to a licensed driver. The renter then loaned the car to an unauthorized driver. It was the unauthorized driver—a person neither I or any of my employees had ever met—that caused the accident that injured this pedestrian. We were not negligent in any way and could not have prevented the accident from occurring. Thus, we should not have been liable.

However, New York is one of a very small minority of states that hold the companies that rent motor vehicles liable for the negligence of persons driving their vehicles—whether that person is a customer or not. In these states, a car rental company can be assessed unlimited damages by a court under the legal doctrine of "vicarious liability" if one of its cars is involved in an accident in which the driver of the car was negligent. Simply because we owned the car, New York law held my company liable for the negligence of our renter.

For me, this lawsuit was the final straw. I am a mother with three children and Capitaland was our sole means of support. I found it incredible that I could lose everything I had worked to achieve for 17 years because of an accident for which I was not at fault. In effect, every time I rented a car to a customer, I was putting my family's future on the line in the hope that the customer did not drive the car negligently and cause an accident.

I made the decision that day to sell my company, the assets of which were purchased by a company that is now Budget Rent A Car. All of my employees were laid off, and another independent car rental company disappeared in New York. And my company is not alone. Capitaland is one of over 300 car rental companies that have closed in New York since 1990.

Unlimited vicarious liability for car rental companies exists in five states (Connecticut, Iowa, Maine, New York, and Rhode Island) and the District of Columbia. One other state, Florida, has limited vicarious liability to a cap of $900,000 per accident. Forty-four other states have either discarded unlimited vicarious liability or never adopted it in the first place.

Vicarious liability for companies that rent or lease motor vehicles is unfair and contrary to one of our nation's fundamental pillars of justice—that a person should be held liable only for harm that he or she causes or could have prevented. In the car rental industry, vicarious liability increases rates for all of our customers, not just for customers in the small minority of states that adhere to this unfair and outmoded doctrine.

Vicarious liability undermines competition in the car rental industry. As I have stated, hundreds of companies have disappeared from New York this decade—leaving the major, nationwide systems as the only car rental option for consumers in the state. In addition, many smaller, growing car rental companies will not do business in vicarious liability states and seek to prohibit their customers from driving into those states. And vicarious liability operates as a legal lottery, enabling trail lawyers to target the so-called "deep pockets" of car rental companies for huge judgments.

I could go on for hours with other examples of this unjust and unfair legal doctrine. Single car accidents where the only person at fault was the driver. A car rented in Ohio and driven to New York where an accident occurred and New York's law was applied. Customers loaning their cars to a friend who loans it to a sibling who runs a stop sign and has an accident. All of these situations have resulted in car rental companies being sued and paying tens of millions of dollars in judgments—despite the fact that the car rental company was not negligent or at fault for the accident.

Together, these cases result in over $100 million in judgments and settlements against car rental companies every year—costs that must be recovered by the companies through the rates they charge every rental customer. In effect, these judgments from this small minority of states results in a tax on all car rental customers everywhere, not just on the citizens of the vicarious liability states.

Section 204 of H.R. 2366 will put a stop to this legal lottery. This provision will pre-empt state vicarious liability laws that hold companies that rent or lease motor vehicles liable for the negligence of their renters or lessors. Specifically, it prohibits a state from imposing liability on a company solely because the company owns the vehicle involved in an accident.

Let me take a minute to tell you what Section 204 will not do. This section will not shield a car rental company from its own negligence or for failing to maintain the car properly. This provision will not shield a car rental company from potential liability if it rents a car to a person who is intoxicated and that person causes an

accident. That is negligence, and this provision will not prevent any action based upon the negligence of the car rental company. In addition, it will not impact on the requirement that a car rental company insure their vehicles at the level required by state law.

Instead, Section 204 of this bill will prevent the situation I faced in 1997—being sued and forced to sell the company that I had worked so hard to make successful.

I urge this Committee to pass H.R. 2366, with Section 204 included, as quickly as possible. While it is too late to help my former company, it is not too late to put a stop to this legal lottery in the future. I also urge the members of this Committee to support H.R. 1954, stand-alone vicarious liability reform legislation introduced by Congressman Bryant, a former member of this Committee.

I would be pleased to answer any questions that my testimony may have raised.

Mr. HYDE. Thank you, Ms. Faulkner. Mr. Bantle.

STATEMENT OF TOM BANTLE, LEGISLATIVE COUNSEL, PUBLIC CITIZEN

Mr. BANTLE. Chairman Hyde, Ranking Member Conyers, members of the committee, thank you for the opportunity to appear today in opposition to H.R. 2366. This bill is yet another attempt to shift the cost of business misbehavior and dangerous products from the businesses that profit from them to the consumer. The provisions of the bill would reduce the ability of some consumers in each of the 50 States to receive full compensation when they are injured.

As harmful as this bill will be to consumers, it will also have a devastating effect on our Federal system of justice because of its radical interference with the judicial authority of State legislatures, judges, and juries to determine fair compensation for injured persons.

Proponents of the bill decry recent State court decisions and claim that tort law changes can only be made at the Federal level. But let's examine why State courts have overturned these anti-consumer statues. Like our Federal Constitution with its Bill of Rights, State constitutions safeguard their citizens' fundamental rights. When a State court overturns a statute as unconstitutional, the statute has trespassed on a right that is so basic to the concept of freedom and justice that the judicial branch is compelled to protect that right even against the State's own legislative branch. That the States' highest courts have overturned overreaching statues should be a warning against, not an invitation to, Federal action.

Title 1 of the bill applies to all civil litigation against small businesses. The bill eliminates joint liability of wrongdoers for non-economic losses such as loss of fertility, a child, or a limb, permanent disfigurement or continuing severe pain.

What does this change mean to harmed consumers? It means that a severely burned child may receive only a small fraction of the jury-awarded compensation for months of excruciating pain and permanent disfigurement.

A second provision of the bill establishes a punitive damages cap of $250,000 or three times compensatory damages, whichever is less. This provision will reduce awards to injured consumers in 43 of the 50 States, including the States of Illinois, North Carolina, California, Tennessee, and Arkansas.

Punitive damages are awarded only in cases of egregious conduct. They are meant to both punish the outrageous behavior and

to provide a deterrent to others contemplating similar wrongdoing. Under this bill, malicious defendants could find it more cost effective to continue their reckless behavior and risk paying defined, limited punitive damages.

For example, a small investment firm that steals its client's lifesavings for its own risky speculations would have punitive damages capped at $250,000, potentially just a small fraction of the million dollars it defrauded from its trusting customers, hardly a deterrent to others.

In a recent Virginia case, a doctor at a small medical professional corporation that specializes in fertility treatments defrauded couples desperate to conceive children by using his own sperm. The actual compensatory damages might have been small, probably just the $2,000 to $3,000 that each couple paid for the treatment. Should such a depraved small businessman receive the benefit of a punitive damages cap of $6,000 to $9,000 per couple instead of the six-figure sum that each family received under current law?

Title II would lessen liability for those that sell or rent unreasonably dangerous products, whether large businesses or small.

To be fair to consumers, many States have adopted a legal standard of strict product liability for retailers. This standard is based on the fact that retailers are in a better position than the injured consumer to know whether their product is dangerous; to repackage, provide warnings or limit the sale of the products; and to spread the cost, through appropriate pricing, of inherently dangerous products among all of those who use the product. Title II would reverse these carefully considered State policy determinations.

Title II would also force consumers to bear the cost of injuries caused by items rented from a rental business. Some States have decided it is fairer to place those costs on the company that makes a profit by renting products and has the ability to self-insure by including the cost of liability in the rental price. But this bill would overturn those States' decisions and impose a one-size-fits-all, anti-consumer Federal doctrine.

In conclusion, H.R. 2366 represents a major interference with the traditional authority of States in civil cases. Why is Congress asked to fundamentally alter the American Federal system of jurisprudence? The business climate in America today is about as good as it gets. There is no liability crisis. In fact, liability insurance rates have declined consistently through the 1990's. In these good times, America's consumers must be astonished that Congress is considering adopting a bill where every provision harms consumers and provides increased immunity for wrongdoers.

On behalf of Public Citizen and its 150,000 members across the country, I urge the committee to reject this unfair and unwise legislation.

[The prepared statement of Mr. Bantle follows:]

PREPARED STATEMENT OF TOM BANTLE, LEGISLATIVE COUNSEL, PUBLIC CITIZEN

Chairman Hyde, Ranking Member Conyers, and members of the Committee: Thank you for the opportunity to appear today in opposition to H.R. 2366.

H.R. 2366 is another in the continuing cavalcade of legislation coming before the Committee this year that would make it more difficult for injured persons to receive full compensation for their injuries. As did the Y2K, class action, and the statute

of repose for defective durable goods bills before it, this bill shifts the costs of business misbehavior and dangerous products from the businesses that profit from them to the consumer. One or more provisions of the bill will reduce the ability of consumers in all 50 states to receive full compensation when they injured.

As harmful as these bills will be to consumers, they will also have a devastating effect on our federal system of justice because of their radical interference with the traditional authority of state legislatures, judges, and juries to determine fair compensation for injured persons. Proponents of legislation like this claim that recent state court decisions such as that in Ohio mean that changes in tort law can't be made at the state level and therefore must be made by the federal government. But let's examine why state courts have overturned these anti-consumer statutes.

Like our federal constitution with its bill of rights that safeguards our most precious freedoms, state constitutions safeguard their citizens' fundamental rights. When a state court overturns a statute as unconstitutional, the statute did not run afoul of some troublesome technicality. No, the unconstitutional statute trespassed on a right of an individual that is so basic to our concept of freedom and justice that the judicial branch is compelled to protect that right even against the encroachments of the government itself.

For example in Ohio, a punitive damage cap (less stringent than that in Title I of the bill we are considering today) was ruled as fundamentally destructive of the right to trial by jury as guaranteed by the Ohio Constitution. That the states highest courts have overturned overreaching statutes harming citizens' basic rights should be a warning against, not an invitation to, federal action.

Proponents of tort law restrictions have complained their legislation has fallen afoul of a state constitutional "trap." But those who fear our constitutions cannot be serving the best interests of our citizens.

TITLE I

Title I of H.R. 2366 applies to all civil litigation and creates new federal limitations on recoveries by persons injured by small businesses (those with fewer than 25 employees):

ELIMINATION OF JOINT LIABILITY FOR NON-ECONOMIC DAMAGES

The bill eliminates joint liability of wrongdoers for non-economic losses (such as loss of fertility, loss of a limb, loss of a child, permanent disfigurement, or continuing severe pain). This would leave consumers without full compensation for their injuries when one or more offenders cannot pay their share of the award, essentially shifting the burden of the losses from those who committed the harm to the innocent injured person.

The bill limits the non-economic damages each culpable party must pay to the percentage of the responsibility for the harm assessed by the court against that wrongdoer. This overturns the doctrine in many states of joint and several liability, which allows an injured plaintiff to recover all the court-awarded damages from any one or any combination of defendants. Joint and several liability is based on the fact that a defendant will only be held liable if his or her wrongful behavior was the actual and proximate cause of the *entire* injury (i.e., the plaintiff's injury would not have occurred but for the defendant's conduct). The defendant's responsibility does not decrease just because another wrongdoer was also an actual and proximate cause of the injury.

What does this change mean to harmed consumers? Take the case of a family dining at a small restaurant when a kitchen fire flares out of control, trapping the mother and daughter in the restroom. Both suffer extensive burns resulting in months of excruciating pain and permanent disfigurement. The fire had gotten out of control because the restaurant failed to have the number of fire extinguishers required by law and its automatic sprinkler system had been improperly installed by a construction company that had since gone bankrupt. In addition to medical bills, the jury had found that the mother and daughter should each receive $100,000 for pain and suffering and disfigurement. The jury had assessed the fault for the injuries at 20% to the restaurant for not having sufficient fire extinguishers and 80% to the bankrupt construction company.

In many states, the small business's insurers would have to pay the family the whole $200,000 since the construction company could not pay its share. But under this bill, the wife and child would each receive only $20,000, 20 percent of the court's award, since the restaurant would not be jointly responsible for the non-economic damages. Would we consider that fair if it were our loved ones who suffered long-term excruciating pain and were permanently disfigured?

Yet the proponents of this bill would deny states the right to decide how to most fairly resolve this kind of case by imposing a one-size-fits-all rule that disadvantages innocent, injured consumers.

PUNITIVE DAMAGES CAP

The bill establishes a punitive damages cap of $250,000 or three times compensatory damages, whichever is less. It arbitrarily limits the amount of punitive damages that could be recovered, no matter how egregious the defendant's conduct. The punitive damages cap in the bill will reduce the award to some injured consumers in 43 of the 50 states, including the following states represented on this Committee: Illinois, Wisconsin, Florida, Pennsylvania, North Carolina, Texas, California, Virginia, Tennessee, Ohio, Georgia, Arkansas, Indiana, Utah, South Carolina, Alabama, New York, and New Jersey.

Punitive damages are simply not awarded for mere negligence, but only allowed in cases of wanton, willful, reckless or malicious conduct. They are meant both to punish outrageous behavior and to provide a deterrent to any other company contemplating similar wrongdoing. Capping punitive damages undermines these deterrent and punishment functions by taking away the decision from the judge and jury who hear all the facts of a case about what is the appropriate amount that should be assessed. Under this punitive damages cap, reckless or malicious defendants could find it more cost effective to continue their callous behavior and risk paying defined, limited punitive damage awards, which would be just another cost of doing business.

When considering this provision, we must remember that this punitive damages cap applies to a very wide range of businesses. Perhaps most of us when thinking of a small business think of mom and pop stores or our local plumber. But the bill's caps would include any business with fewer than twenty-five employees. This means that a small investment firm that steals its clients' life savings for their own risky day trading or derivatives speculation would have punitive damages capped at $250,000, potentially just a small fraction of the millions of dollars it defrauded from its trusting customers.

In a currently pending case, a three-person Maryland firm is accused of fraudulently selling oral and injectable aloe vera as a cure for cancer. They conned a desperate husband and father into relying upon this treatment instead of seeking the standard chemotherapy for esophageal cancer, hastening his death. Should the perpetrators of this fraud be shielded from a large punitive damage award? Isn't the community harmed by limiting the deterrent effect of punitive damages to prevent this kind of malicious behavior?

In another local case, a doctor at a small medical professional corporation that specializes in fertility treatment defrauded couples desperate to conceive children by using his own sperm. The actual compensatory damages might have been small, probably just the $2,000–$3,000 each couple paid for the "treatment." Should such a depraved small businessman receive the benefit of a punitive damages cap of $6,000–$9,000 per couple, instead of the six-figure sum that each family received under current law? I think most Americans would find that result unjust and unconscionable.

Our current system that allows juries and judges to determine what size award will deter and punish conduct the community finds particularly egregious has protected us well. It should not be abandoned.

HIGHER EVIDENTIARY STANDARDS FOR PUNITIVE DAMAGES

The bill establishes for the first time a federal standard for awarding punitive damages in all civil cases brought against small companies, including products liability, environmental torts and employment actions. The legislation mandates that punitive damages may only be awarded if the plaintiff shows by *clear and convincing evidence* that the conduct carried out by the defendant was either *willful misconduct* or was with a *conscious, flagrant indifference* to the safety of others *and* that this was the proximate cause of the harm that is the subject of the lawsuit. Each of these three new evidentiary tests for punitive damages would wipe out existing state laws for punitive damages, even though every state already requires that a plaintiff prove the defendant acted in some particularly deliberate or egregious way to receive punitive damages. The proposed bill would take the most pro-defendant formulation and apply it to every state.

ONE-WAY PREEMPTION

The bill only preempts the laws of those states that offer greater consumer protections. In contrast, the bills do not preempt state laws that provide greater immunity

for misbehaving small businesses. If Congress is going to preempt state law, it should at least be consistent and preempt all laws in this area, instead of tilting the preemption in favor of defendants.

TITLE 2, "PRODUCT SELLER FAIR TREATMENT"

This title would lessen liability for those who sell or rent dangerous products, and therefore make it more likely that consumers will not receive fair and full compensation when injured by those products. The title applies to most product liability actions brought in federal or state court against product sellers (including retailers, distributors, renters, lessors, labelers, or packagers), whether they are large businesses or small. (Section 204(c) softens the harm of this Title by allowing product sellers to be sued as manufacturers if the true manufacturer cannot be sued or if a judgment would be unenforceable.)

In any product liability action covered by the bill, a product seller is liable only if the plaintiff establishes one of the following three sets of facts:

- the product was sold, rented, or leased by the product seller, the product seller failed to exercise reasonable care, and the failure to exercise reasonable care was a proximate cause of the harm to the plaintiff;
- the product seller made an express warranty applicable to the product independent of any express warranty made by a manufacturer as to the same product, the product failed to conform to the warranty, and the failure of the product to conform to the warranty caused the harm to the claimant; or
- the product seller engaged in intentional wrongdoing and the intentional wrongdoing caused the harm.

In some cases such standards will leave an innocent consumer to bear all the costs of an injury or death caused by an unreasonably dangerous product. To be fair to innocent consumers, most states have adopted a legal standard of strict product liability. Those states have recognized that consumers expect and have the right to have product sellers stand behind their products. Strict product liability is based on the fact that both manufacturers and retailers are in a better position than the injured consumer to:

- know whether a product is dangerous;
- redesign, repackage, provide warnings, or limit the sale of defective products; and
- spread the costs (through appropriate pricing) of inherently dangerous products among all those who use and benefit from the product.

Given this greater knowledge of and better ability to avoid product defects, many state courts have ruled that it is fairer for manufacturers and retailers to bear the burden of the product failure than it is to impose that burden solely upon the injured person.

Title 2 would reverse these carefully considered state policy determinations by eliminating strict product liability for sellers. Some injured consumers could be left with no compensation for their injuries. Again the bill shifts the cost of dangerous products from the retailers who profit from their sale to the injured consumers and their families, employers, and communities.

IMMUNITY FOR OWNERS OF RENTAL EQUIPMENT

Title 2 of the bill would also reverse the determinations by a small number of states that rental companies should be vicariously responsible to the persons injured by items they have rented.

A typical example of whom this provision would adversely affect is a consumer seriously injured in a crash caused by a person negligently operating a rental car. The minimal insurance carried by the negligent driver may be quickly exhausted, leaving the innocent victim facing enormous additional costs including medical bills and loss of wages.

Some states have decided that it would be unfair to leave the injured, innocent consumer uncompensated. Instead those states' laws place the loss on the company that makes a profit by renting cars and has the ability to self-insure itself for that liability by including that cost in the price it sets for car rentals.

While most states have not made this choice, it certainly is a reasonable option. The federal government again should not jump into an area of law that has in our system been left to the states to impose its one-size-fits-all determination that leaves injured consumers out in the cold.

CONCLUSION

H.R. 2366 represents a major interference with the traditional authority of state legislatures and state court judges and juries in civil cases. Tort law has been the province of the states since this country began. Such preemption of the proper role of the states has been strongly opposed by the Conference of State Chief Justices in past testimony. It was stated best by the Honorable Stanley Feldman, Chief Justice of the Supreme Court of Arizona, who told Congress that "tort remedies must lie with State courts and legislatures, which are most aware of and best suited to determine the social and economic impact of present law on their own communities." The genius of American state tort law has been its ability to evolve to meet changing risks and changing societal norms about acceptable corporate and personal behavior.

In this evolution, some state legislatures have decided that they wish to cap punitive damages, abolish joint liability, and cut off sellers' liability for unreasonably dangerous products. But many others have not.

The only reason for federal intrusion into tort law would be if the nation were facing some crisis that warranted the overturning of more than two hundred years of letting each state decide how best to balance the protection of the health and safety of its citizens and the needs of its businesses. But the fact is that the business climate in America is "about as good as it gets." There is no liability crisis for businesses. In fact liability insurance rates have consistently declined throughout the 1990s. The July 5, 1999 issue of *National Underwriting* notes continued liability premium decreases in 1998. The proponents of the bill have shown no basis for fundamentally altering the American federal system of jurisprudence by stripping away from states matters traditionally governed by state legislatures and state courts.

Certainly American consumers should question why this bill is so one-sided. Why does every provision in this bill overturn the choices of many states to better protect consumers?

There is no justification for this unfair bill, which leaves consumers and their families without full compensation for their injuries. On behalf of Public Citizen and its 150,000 members across the country, I urge the Committee to reject this unfair and unwise legislation.

Thank you again for the opportunity to testify on this important matter.

Mr. HYDE. Thank you very much, Mr. Bantle. Mr. Keeley.

STATEMENT OF GEORGE KEELEY, ESQ., KEELEY, KUENN & REID, ON BEHALF OF THE ASSOCIATION OF WHOLESALER-DISTRIBUTORS

Mr. KEELEY. Good morning, Mr. Chairman and members of the committee. I want to thank you for inviting me to testify before the committee this morning. My name is George Keeley. I am a partner in the Chicago law firm of Keeley, Kuenn & Reid. We serve as general counsel to the National Association of Wholesaler-Distributors on whose behalf I appear here today. NAW is the national voice of the wholesale distribution industry. It is comprised of approximately 40,000 companies that are affiliated either through direct membership in NAW or through NAW's federation of 153 national, regional, and State commodity line trade association.

Today the moment a wholesaler-distributor in any way becomes a link in the product's chain of distribution, that company's exposure to product liability lawsuits and related costs is established. That exposure relies neither on the wholesaler-distributor's physical control of the product nor any allegation that the wholesaler mishandled the product or acted in any way to create the defect that caused the claimant's harm. Consequently, wholesaler-distributors are routinely joined in product liability tort lawsuits and confronted with the substantial legal, lost productivity and other costs attendant to them.

Nevertheless, cases with outcomes in which a wholesaler-distributor is ultimately responsible for the claimant's compensation

are rare because where it is determined that the claimant's injury has been caused by a product defect, it is the product's manufacturer that is found to be culpable in rendering the product defective. As a result, innocent victims of injuries caused by product defects are compensated ultimately by the responsible parties, but only after innocent defendants, wholesaler-distributors, have incurred substantial litigation related costs, most of which by their very nature cannot be indemnified. It is important to note that these necessary costs which are passed along and ultimately borne by consumers could be avoided altogether were the lawsuits focused at the outset on the responsible parties, those in a position to avoid the harm in the first place.

To achieve this goal, a national uniform standard of product liability for sellers that appropriately distinguishes between the differing roles of manufacturers and nonmanufacturer product sellers in the chain of distribution is needed. Such a standard is proposed in section 204 of H.R. 2366.

Let me make a few very brief points about this proposal. First, it provides, a clear and straightforward liability standard that reflects product liability standards on the books in 21 States today, including Georgia, Louisiana, Michigan, New Jersey, North Carolina, Ohio, and Tennessee. If applied nationally, this standard will shield innocent wholesaler-distributors from unnecessary claims and lawsuits appropriately directed elsewhere, saving wasteful legal and other litigation related costs. Enactment will benefit nonmanufacturers in the States just referenced because products do move in interstate commerce, which severely limits the effects of individual State laws and case decisions on their own citizens.

Second, even in those instances where a wholesaler becomes a defendant in a product liability lawsuit in which its conduct is not an issue, this standard of liability would provide a fair basis for its early dismissal from the proceeding, again saving costs that are otherwise wasted.

Finally, section 204 is careful to protect the ability of victims to recover full compensation when the culpable manufacturer either can't be reached by judicial process or satisfy a judgment, and relieves claimants from bearing the risk of the defendant manufacturer's insolvency between the time that the lawsuit is filed and the judgment is entered.

In summary, Mr. Chairman, I respectfully urge the committee to give prompt and favorable consideration to this legislation. Its product liability standard will reduce unnecessary litigation, save the wasteful legal and other litigation related costs the current system generates, and enhance the ability of innocent victims of defective products to recover fully from their injuries.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Keeley follows:]

PREPARED STATEMENT OF GEORGE KEELEY, ESQ., KEELEY, KUENN & REID, ON BEHALF OF THE ASSOCIATION OF WHOLESALER-DISTRIBUTORS

SUMMARY

The National Association of Wholesaler-Distributors (NAW), on behalf of its 153 member wholesaler-distributor associations and 40,000 affiliated companies, strongly supports H.R. 2366, the *Small Business Liability Reform Act of 1999*; in particular, Title II of that legislation.

Current product liability law is comprised of different sets of rules and standards for each of the 50 states and the District of Columbia, the majority of which make no distinction between the differing roles and legal responsibilities of manufacturers and nonmanufacturing product sellers. Consequently, innocent wholesaler-distributors are routinely named as defendants in product liability lawsuits and may be held liable as though they were the product's manufacturer. Although wholesaler-distributors are rarely ultimately responsible for paying a successful claimant's compensation, they incur substantial and unnecessarily wasteful legal and other litigation-related costs, such as those attributable to lost time and productivity and damage to their reputations.

Section 204 of H.R. 2366 establishes an efficient, fair and focused standard of liability for nonmanufacturing product sellers that will shield blameless wholesaler-distributors from lawsuits and facilitate early dismissals from cases in which their conduct is not an issue. It establishes clear rules that can be easily understood by plaintiffs and defendants and readily applied by judges and juries in product liability cases. The bill is careful not to overreach and effect cases—negligent entrustment for example—that are outside the scope of "product liability" or change State law causes of action against manufacturers for injury-causing defects in a product's construction, design or warnings, and for breaches of express warranties. Additionally, section 204 clearly establishes that nonmanufacturing product sellers shall be liable for breaches of their own express warranties.

Section 204 is equally careful to ensure that victims of defective products will not be without redress whenever there exists within the court's jurisdiction a solvent manufacturer or product seller in an injury-causing product unit's chain of distribution.

The product liability litigation system will function more efficiently and deliver fairer results if H.R. 2366 is enacted. Lawsuits will be more appropriately directed, and innocent parties in the chain of distribution will be spared the wasted costs associated with unnecessary litigation.

INTRODUCTION

Mr. Chairman, I appreciate your invitation to appear before the Committee today to share with members my views regarding Title II of H.R. 2366, the Small Business Liability Reform Act of 1999.

My name is George Keeley, and I am a partner in Keeley, Kuenn & Reid, a Chicago-based law firm which currently provides legal counsel to 27 commodity-specific wholesaler-distributor trade associations. Keeley, Kuenn & Reid also represents individual wholesale distribution companies, in which capacity our firm has gained extensive experience in product liability counseling and litigation involving nonmanufacturing product sellers.

The National Association of Wholesaler-Distributors and the Wholesale Distribution Industry

The firm is legal counsel for the National Association of Wholesaler-Distributors (NAW), which I personally serve as general counsel. NAW, on whose behalf I appear today, is comprised of Direct Member companies and a federation of more than 150 national, regional, state and local associations (list attached as Appendix A) and their member firms which, collectively, total approximately 40,000 companies operating at some 150,000 locations throughout the nation. NAW's members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end-users. While industry firms vary widely in size, wholesaler-distributors generally are small to medium-size, closely-held businesses providing stable, well-paying jobs to more than 5 million Americans and account for some $2.3 trillion in annual economic activity.

Wholesaler-Distributors in the Current Product Liability System

Today, Mr. Chairman, innocent wholesaler-distributors are routinely joined in litigation involving defective products absent any allegation of fault, negligence or causal connection between the distributor's conduct and the plaintiff's injury.[1] It

[1] *The Restatement (Third) of Torts: Product Liability*, Comment e, Non-manufacturing sellers or other distributors of products; 63 Am Jur. 2d, *Products Liability*, Sections 85, 88 and cases cited therein; *Perry* v. *Prom Co., Inc., et al.*, Circuit Court of Cook County, IL, No. 98 L 11377 (two distributors who allegedly sold unspecified sandblasting products); *Waldschmidt* v. *Atherton Machinery & Equipment Corp., et al.*, 17th Judicial Circuit Court, Kane Country, IL, No. LKA 90955 (distributor who sold allegedly defective punch press component which was dropped shipped directly from component manufacturer to plaintiff's employer).

in Texas which gave him no safety training or safety equipment. The small business, Esco Communications, Inc., also used inappropriate equipment to offload these construction materials. *Because Esco Communications has only a few employees, the most it could be liable for, if this legislation is enacted, for killing this youth is $250,000 in punitive damages, despite the company's clear lack of compliance with proper safety procedures.*

- *Another teenager is killed after drinking a poisonous solution improperly stored in a milk jug.* In 1993, John D'Angelo, President of Utilityfree, Inc., a Colorado-based business with fewer than 10 employees, delivered a order of potassium hydroxide solution—a highly corrosive clear liquid—to an electrician. Mr. D'Angelo violated federal law by packaging this liquid in a reused milk carton. Federal law, as administered by the CPSC, requires such solutions to be packaged in a clearly-labeled child-resistant container. If Mr. D'Angelo had followed proper procedures, Justin Pullman would be alive today. Instead, he died 13 days after ingesting some of this solution while helping to move it. *If this legislation is enacted, small companies which are found to be multiple violators of federal safe practices laws will face little in the way of punitive damages—even in egregious cases such as this one.*
- *A small company continues to sell highly flammable clothing, even after the CPSC advises them of the safety hazard.* All That Glitters, a San Francisco-based business with approximately 15 employees, continued to import and sell women's clothing from India even after the CPSC advised them that their products did not meet U.S. flammability standards. In 1994, the firm agreed to stop selling these products and to recall previously sold garments, per the CPSC's request. But, in fact, owners of the company, the Dalys, continued to sell these dangerous products. In 1996, the Dalys both pled guilty to two criminal violations and were sentenced and fined. *These sorts of small companies, where the owners are willfully violating the law, must be held fully accountable.*
- *A company, with six employees, that imported cigarette lighters, and then removed the child resistant features, should be held fully accountable.* National Marketing imported cigarette lighters from China. After the CPSC established lighter safety standards, including the required inclusion of child resistant features in 1994, National Marketing began paying employees to remove these child safety features before selling them to retailers. The owner of the company, Donald Anthony, conspired to defraud the CPSC, made false statements to the investigators and obstructed justice, according to the indictment pending against him. *Mr. Anthony now faces a trial with a pending seven count felony indictment. His business has folded. Mr. Anthony and his company's liability should not be limited by the number of individuals he employs.*
- *Corey Rebne was rendered a quadriplegic for life by the all-terrain vehicle (ATV) he was operating on a U.S. Wildlife Refuge.* Norbett Arnold, d/b/a Arnold Equipment Company, manufactured the vehicle (brand name "Otter"). Despite the company's knowledge of the likelihood and dangers of rollovers involving ATVs, and numerous reports of injuries and deaths involving rollovers of other "Otters," Norbert Arnold failed to install a rollover protection system on these vehicles. *Because Norbert Arnold has less than 25 employees it would be impossible to hold the company fully accountable for this tragedy.*
- *William Ogden was killed, leaving behind a wife and infant child, when he was swept over the edge of a five story roof by a defective power roof hoist.* Smith Hoist Manufacturing continued production of the hoist despite knowledge that the product's design and defective counterweight device had caused other operators to be swept over roof tops and seriously injured. Smith refused to even affix a warning label on the hoist. Only after lawsuits were filed did Smith change the counterweight design and affix warning labels. Unfortunately, these improvements came too late for William Ogden. *Because Smith Hoist had less than 25 employees, it would be impossible to hold the company fully accountable for this tragedy.*
- *Ronald Morgan's legs were both amputated below the knee after he was injured by a dangerous conveyer manufactured by Karl W. Schmidt & Associates, Inc.* Schmidt's company president testified that a conveyor's lack of an emergency stop button made the conveyor unreasonably dangerous; however, he marketed his conveyer without this safety feature nor with any instructions, warnings, or operator's manual for set-up or operation of the conveyor.

Because Karl W. Schmidt & Associates, Inc. had less than 25 employees, it would be impossible to hold the company fully accountable for this tragedy.

- *Toy Wonders, a company with only 10 employees, illegally imported 36,693 toys containing small parts despite knowledge that the toys presented a choking and aspiration hazard to young children.* The Consumer Product Safety Commission (CPSC) assessed a fine of $75,000 against the company. *However, under the small business exemption, Toy Wonders' punishment for endangering a child's life could only be assessed at $250,000—a mere three-fold increase in the amount of the CPSC's fine.*
- *Neptune Fireworks Company, Inc., illegally imported for sale 8,116,614 dangerous firework devices,* as well as 600 "Gorilla Bomb II" multiple-tube fireworks. These fireworks were known to tip over and fire horizontally, causing two known deaths. The company was fined $45,000 by the CPSC. *Because Neptune Fireworks Company has only 7 employees, under the small business exception, deaths from these illegally imported products could only be punished by a $250,000 award.*

FEDERAL PREEMPTION OF OUR STATE-BASED LIABILITY SYSTEM UNDERMINES IMPORTANT PRINCIPLES OF FEDERALISM

The proponents of H.R. 2366 clearly don't trust the states or their laws. It's that simple. State legislatures, state courts, even state constitutions get overridden by the provisions of this bill. It's another case of "Washington knows best!"

Title II of the bill, the seller liability title, is an example. As discussed below, provisions in Title II would discard the law of at least 46 states—in one fell swoop! No matter that legislatures and courts in those states have already imposed strict responsibilities on product sellers in their dealings with consumers. In Title II of H.R. 2366, Washington says to those states: "No more. From now on, sellers in your states will have limited accountability. In many cases, none at all."

The preemption of state law in Title I of the bill, the small business title, is equally troubling. Under that title, after 90 days, the states' small business liability laws would be extinguished and replaced by the proposed federal scheme. While states would be granted the right to pass a statute that could make the federal scheme inapplicable, state legislatures would not be entirely free to follow their own legislative procedures. They would still be bound by the dictates of H.R. 2366, and told exactly what could and could not be part of an acceptable bill. Finally, and this will put an end to any pretense that the purpose of the bill is uniformity or "certainty" in interstate commerce, H.R. 2366 would not preempt any state laws that provide small businesses with broader liability protections than this bill. Yet, consumers are not afforded the preservation of existing state protections.

For more than 200 years, civil liability under tort and contract law have been the sovereign domain of the states. Federal preemption of our state-based liability system is not just unwise, it seems contrary to the present political and legal environment. Over the past decade, Congress has been working to give more authority back to the states. Instead, this bill is a huge power grab from the states. Perhaps more importantly, recent judicial decisions in states such as Ohio, Oregon and Illinois leave no doubt that limits on liability such as those proposed in H.R. 2366 are incompatible with constitutional principles in a number of states. We believe it would be unconscionable for this Congress to use its federal power to extinguish state constitutional liberties that protect workers and consumers, and that ensure access to justice under state law.

PUNITIVE DAMAGES, ALTHOUGH RARE IN OCCURRENCE, ARE IMPORTANT DETERRENTS

The claim by the proponents of H.R. 2366 that "the magnitude and unpredictability" of punitive damages have created a need for reform is specious. Again, the proponents of this bill have derived their ideas from anecdotes and the media attention that punitive damage awards tend to create—without looking at the facts. Punitive damage awards are extremely rare, and are only applied in the most egregious cases of misconduct. They are also always subject to judicial review, which often reduces the amount. Punitive damages are generally awarded when the plaintiff has proven by clear and convincing evidence that the wrongdoer's conduct was recklessly indifferent to the safety of others or was done with malice. While punitive damages are rare, they serve the crucial function of deterring businesses from releasing harmful products into the stream of commerce.

Special punitive damage protections for small businesses had their origin in the proposed (and subsequently vetoed) federal product liability bill during the 104th Congress. There was not then, and there is not now, a punitive damage "crisis" in product liability cases. A 1992 study by Professor Michael Rustad found only 355

punitive damage awards in product liability cases between 1965 and 1990[11] in what the Supreme Court called "[t]he most exhaustive study ever"[12] in regards to federal and state product liability awards. Excluding the 91 asbestos cases from the total (26% of the cases), there were an average of only 11 punitive damage awards per year in the entire country. In addition, over half of the punitive damage awards in this study were either reduced in settlement negotiations or were reduced or reversed by an appellate court.[13] Stephen Daniels and Joanne Martin also studied punitive damage awards. They found that punitive damages were awarded in only 1.5% of personal injury cases between 1988 and 1990, and in only 9% of business and contract cases.[14]

Additionally, the belief that the "unpredictability" of punitive damages is affecting small businesses is just as unfounded as the belief that punitive damages awards are frequent occurrences. Professor Theodore Eisenberg found, in his study on the predictability of punitive damages, that "[f]ar from picking numbers out of the air, jurors and judges across dozens of jurisdictions and many case categories determine punitive damages award levels with a startling consistency."[15] The fact that punitive damage awards are infrequent and are meted out in a judicious manner by judges and juries does not decrease their deterrent power.

The occasional punitive damage award, and more importantly, the threat of such awards, have made American families safer. For instance, more than 75 percent of the non-asbestos defendants subject to punitive damage awards between 1965 and 1990 took some sort of post-litigation step toward making their products safer, usually in the form of fortified warnings, product withdrawals or added safety features. For example, a manufacturer of children's pajamas stopped using highly flammable materials in 1980 only after a Minnesota jury ordered the company to pay punitive damages to a 4-year-old girl who was severely burned when her pajama top caught fire.[16] The A.H. Robins Company did not voluntarily recall the dangerously defective Dalkon Shield IUD or compensate the thousands of women injured by the device. Compensation and the eventual recall came only after punitive damages were levied against the company.

H.R. 2366 attempts to protect small businesses from problems that simply do not exist, while at the same time endangering American families by weakening a powerful deterrent. Punitive damages keep dangerous products out of the marketplace and prevent dangerous business conduct. H.R. 2366 would allow callous defendants to escape meaningful punishment, thereby endangering our families unnecessarily.

ELIMINATION OF JOINT AND SEVERAL LIABILITY FOR NON-ECONOMIC DAMAGES IS UNFAIR AND DISCRIMINATORY

For nearly two decades, some in Congress have sought to remove from our system of civil justice the long-standing doctrine of joint and several liability. Certainly, the provisions in H.R. 2366 that would abolish this doctrine with regard to non-economic damages do not represent the first attempt to achieve this result by a sweeping use of federal power, nor is this testimony the first time that ATLA has come before the Congress to express its opposition. In the past, each time we have appeared to oppose the elimination of joint and several liability, it was our view that the drafters of a particular bill sorely misunderstood the principles of fairness that are the underpinning of this doctrine. Frankly, it is hard to maintain that view any longer.

Those that are coming before Congress to seek this relief, and some in the Congress itself, do not misunderstand the principles behind joint and several liability.

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[11] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 38* (1992). Rustad is a Professor of Law at Suffolk University Law School.

[12] *Honda Motor Co., Ltd.* v. *Oberg*, 114 S. Ct. 2331, 2341, fn. 11 (1994) (discussing Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1* (1992)).

[13] Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 55* (1992).

[14] Stephen Daniels and Joanne Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards* 11 (American Bar Foundation Working Paper No. 8705, 1987). Daniels is a Senior Research Fellow at the American Bar Foundation, Martin is the Assistant Executive Director to the American Bar Foundation.

[15] Theodore Eisenberg et al., *The Predictability of Punitive Damages 18* (paper prepared for the John M. Olin Conference on Tort Reform, University of Chicago Law School, June 14–14 1996) *cited in* Mark Galanter, *Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1039, 1139 (1996).* Eisenberg is the Henry Allen Mark Professor of Law at Cornell University Law School.

[16] *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980).

It is especially ironic that proponents of this bill—in the bill's very first "Finding"—seek the correction of a system they call "unfair." The fact is that the *intended* consequence of abolishing joint and several liability for non-economic damages is unfairness. This does not proceed from some misunderstanding. This is a calculated, deliberate choice that says: "When one wrongdoer cannot pay its portion of the judgment, Congress should protect the other wrongdoers rather than worry about compensating the innocent party. Let the innocent party bear the cost." How is that "fair"?

H.R. 2366, in fact, would so thoroughly shred the doctrine of joint and several liability that it would have the jury determine the exact "percentage of responsibility of each person responsible for the harm to the claimant, *regardless of whether or not the person is a party to the action*." How is *that* fair, or even efficient?

Mr. Chairman, joint and several liability, on the other hand, seeks fairness to both plaintiffs *and* defendants.

Joint and several liability says that we will first and foremost compensate the injured party who suffered harm through no fault of their own. Joint and several liability then says that once that individual is compensated, we will taken them out of the system and then allow those defendants who have been found to have caused the harm to properly apportion damages amongst themselves. The liable defendant who has paid more than its share of the damages in the first instance is empowered to seek contribution or indemnity from the others who have contributed to the harm. Therefore, joint and several liability makes the value judgment that the burden and cost of apportioning damages should be placed on those who caused the harm and not on the party that suffered the harm. In the event that one or more defendants succeed in avoiding the reach of the court, obviously an inefficient and undesirable result occurs. But there is no way to avoid some inequity here. Either the innocent injured party shall be made to suffer by receiving less that the compensation that they are entitled to, or one or more of the defendants who have caused the harm will be forced to pay more than their apportioned share. Out of these two results, there is only one fair choice: joint and several liability.

Furthermore, by eliminating joint and several liability for non-economic damages only, H.R. 2366 is clearly saying to the women, the elderly, and the lower- and middle-income persons of this country that the law should be less concerned whether those people are fairly compensated. While H.R. 2366 guarantees that the corporate CEO who misses some time from work will be fully compensated for his large lost salary, to the non-working Mom who suffers the same injury, the bill says: your loss is less real and we cannot guarantee full compensation. And to the woman who has lost her ability to have children, she too has not suffered a "real" loss. H.R. 2366 dismisses her loss as "mere pain and suffering" for which she will no longer be guaranteed compensation.

LIMITING PRODUCT SELLER LIABILITY IS UNFAIR

One of the most troubling aspects of H.R. 2366 is its attempt to abolish vicarious liability for sellers—a long established principle that one entity can be held liable for the actions of another, based on their relationship to each other. Here, the proponents of these so-called "reforms" are seeking to end the practice of holding sellers liable for placing dangerous or defective goods into the stream of commerce. The courts established the principle of vicarious liability to ensure injured parties recover damages for the harm they have suffered, but also to encourage sellers to monitor what they sell and to ensure safer products are available to American families and consumers. This bill would gut this principle by only holding sellers liable for the sale of dangerous or defective products if the seller's actions are determined to be the proximate cause of harm, or the manufacturer is insolvent or cannot be held responsible for other reasons. I urge the Committee to consider the far reaching effects of this proposed overhaul of a fundamental principle of our nation's tort system.

Title II of H.R. 2366 also rolls back mainstream American law by including an astonishingly sweeping preemption of state law. Forty-six states have adopted some form of strict liability through their courts or legislature (often based on section 402(a) of the Restatement Second of Torts, and now Chapter One, Section One of the new Restatement Third) in cases when a product defect causes injury. The great majority of these states include product sellers in that standard. Under the law of the majority of the states, because product sellers are a vital link in the chain that brings products to our citizens, they can be held accountable when they sell unreasonably dangerous products to consumers. H.R. 2366 rolls back that standard.

H.R. 2366 also would eliminate a seller's common law *duty to warn* citizens about a product's potential dangers. This duty to warn is centuries old and is embodied

in sections 388 and 402(w) of the Restatement (Second) of Torts, and now Chapter One, Section 2(c) of Restatement Third. It would be a mistake to overturn mainstream and majority law in this area as well.

In addition, H.R. 2366 takes away a citizen's right to hold a seller accountable on the well-established basis of breach of *implied warranties*. It would thus overturn the provisions of the Uniform Commercial Code which hold sellers responsible for breaches of express *and* implied warranties.

Finally, the exception in the bill to Title II's virtual immunization of product sellers causes problems. The bill provides that the seller may not claim the benefits of the protections of the bill if for some reason the manufacturer of the product in question is not subject to service of process under the laws of the state in which the claimant brings the action, or if the court determines that the claimant would be unable to enforce a judgment against the manufacturer. The satellite litigation through motions, memoranda, discovery, and appeals that would be generated to prove that this exception applies, presumably over the vigorous opposition of the product seller, would be enormous, costly and the source of great delay.

CONCLUSION

For all of the reasons cited above, ATLA urges the members of this Committee to oppose H.R. 2366. This bill massively overhauls our liability laws even though there is no evidence of a liability crisis in our nation's thriving small business community, or a crisis in our state courts or legislatures. Those who seek fundamental change in our system of federalism and our system of responsible free-market enterprise should present a compelling case for such change. Members of the Committee, I respectfully put forward to you that such a case has not been made on the facts before you. Therefore, H.R. 2366 should be opposed.

Mr. HYDE. Thank you, Mr. Middleton. Professor Estes.

STATEMENT OF RALPH ESTES, PROFESSOR EMERITUS, AMERICAN UNIVERSITY BUSINESS SCHOOL

Mr. ESTES. I want to thank the chair and this committee for the opportunity to testify on this proposed legislation.

I am emeritus professor of accounting at American University and director of the national Stakeholder Alliance. That is Stakeholder Alliance and not stockholder alliance.

My background includes work as a CPA with the accounting firm of Arthur Andersen & Company, research as student of corporations and corporate accountability, I am author of *Tyranny of the Bottom Line, Corporate Social Accounting*, and the Estes Economic Loss Tables, a CPA professor, accounting department chair, and work as a consultant and active participant in the American Institute of CPAs, the Financial Executives Institute, and my local chamber of commerce in times past. I have had the opportunity to know many corporate executives and observe the inner workings of corporations and in particular their decision process.

I have been an expert witness in dozens of cases involving wrongful death, personal injury, and discrimination. My experience in these cases is not theoretical. I have been in the courtroom and watched victims who have required medical care around the clock undertaking to get justice. I have watched corporations undertaking to stymie that justice so they could go out and repeat their sins. I have never, members of the committee, seen a victim made whole, and never, not once, have I seen a victim made even economically whole. So when you say the system of justice is not working, you are absolutely right in that respect.

I would like to address some of the findings in the proposed bill in section 101. It appears to me that they may reflect some excessive enthusiasm on the part of staff and may not have received adequate scrutiny from the members of this committee. For exam-

ple, finding 1. It says the United States civil justice system is inefficient and impedes competitiveness. Is this Congress actually prepared to say competitiveness is more important than customer and worker safety, more important than a sustainable environment, more important than justice?

Finding 4 says the spiralling cost of litigation and the magnitude of punitive damage awards have continued unabated for the last 30 years. Considerable research has been done on this issue. The conclusions are at best mixed. I am not familiar with congressional standards for staff work, but as professor, I would not accept such a categorical and biased statement from a student.

Finding 5 says the Supreme Court of the United States has recognized that a punitive damage award can be unconstitutional if the reward is grossly excessive in relation to the legitimate interest of the government and the punishment and deterrence of unlawful conduct. It is my judgment that victims of corporate misconduct would readily endorse prohibition of punitive damages grossly in excess of the amount necessary to deter the harmful behavior of corporations if, number one, the government and this Congress, would vigorously seek to punish and deter unlawful corporate conduct; number two, if this Congress would institute and require full corporate accountability to the stakeholders that corporations affect; and number three, if this Congress would express as much concern for the health, safety, and protection of customers, workers, and communities as it expresses for the financial interests of stockholders.

Finding 8 says the costs imposed by the civil justice system on small business are particularly acute because small businesses often lack the resources to bear these costs and to challenge unwarranted lawsuits. I wonder what the Congress' concern is about the impact of this system on the poor people who are injured by these corporations?

Section 103 limits the punitive damages or puts a cap on them. It may be well intentioned, but based on my experience with corporations and their decision-making apparatuses, it fails to take into account the motivational factors that inspire business decisions. This section would provide more than a license to do harm. It would practically call to the business manager, "do this, make the calculation on the cost of insuring a safe product through inspection, testing, and production design; b) compare that cost to the expected value of damages likely to be awarded taking into account the chain of probability multiplications that result in the final expected value and be sure to discount this estimate to its present value. Now, if A is greater than B, reject the safety precautions and let the customer pay the price in health and in life."

In conclusion, I would say that when corporations, large or small, use the sort of cold blooded calculations that I have just described, that I have seen in practice and heard presented in courtrooms, to sacrifice human health and safety and even life because their only care is for the bottom line, then the people's representatives should not tip the scales even further toward soulless corporations and away from the stakeholders who are affected by corporate actions.

This bill speaks for business, small business today and surely small business tomorrow. Who speaks for the people? Who speaks

for the business stakeholders, the victims of business abuses? If Congress elevates business over people, then to whom should the people turn? If Congress will not listen, what would you propose? What would you expect a fed up public to do?

Thank you.

[The prepared statement of Mr. Estes follows:]

PREPARED STATEMENT OF RALPH ESTES, PROFESSOR EMERITUS, AMERICAN UNIVERSITY BUSINESS SCHOOL

My name is Ralph Estes. I am emeritus professor of accounting at American University and director of the national Stakeholder Alliance.

- Student of corporations, corporate accountability, and corporate history (*Tyranny of the Bottom Line* and *Corporate Social Accounting*)
- AA&Co CPA
- As CPA, professor, department chair, and consultant I have come to know many corporate executives and the inner workings of many corporations, particularly with respect to the way in which decisions are made
- Expert witness
  - —I have testified on economic loss in a large number of cases concerned with product liability and involving personal injury or wrongful death.
  - —I never saw a victim made whole—not once, in dozens of cases.

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1. The "findings" (Sec. 101) stated in the proposed bill may reflect some excessive enthusiasm on the part of staff, and may not have received adequate scrutiny from the members of this committee. For example:
   - — Finding (1): the United States civil justice system is inefficient, unpredictable, unfair, costly, and impedes competitiveness in the marketplace for goods, services, business, and employees.
     Is this Congress actually prepared to say that competitiveness is more important that customer and worker safety, more important than a sustainable environment, more important than justice?
   - — Finding (4): the spiraling costs of litigation and the magnitude and unpredictability of punitive damage awards and noneconomic damage awards have continued unabated for at least the past 30 years.
     Considerable research has been done on this issue, and the conclusions are at best mixed (note research reports). I am not familiar with Congressional standards for staff work, but as a professor I would not accept such a categorical and biased statement from a student.
   - — Finding (5): the Supreme Court of the United States has recognized that a punitive damage award can be unconstitutional if the award is grossly excessive in relation to the legitimate interest of the government in the punishment and deterrence of unlawful conduct.
     It is my judgment that victims of corporate misconduct would readily endorse prohibition of punitive damage awards grossly in excess of the amount necessary to deter the harmful behavior of corporations, *if*
     (1) the government—this Congress—would vigorously seek to punish and deter unlawful corporate conduct
     (2) this Congress would institute and require full and fair corporate accountability to the stakeholders they affect
     (3) this Congress would express as much concern for the health, safety, and protection of customers, workers, and communities as it expresses for the financial interests of stockholders.
   - — Finding (8): the costs imposed by the civil justice system on small businesses are particularly acute, since small businesses often lack the resources to bear those costs and to challenge unwarranted lawsuits.
     This "finding" expresses concern for small businesses, but does not express concomitant concern for the victims of misbehavior by businesses small or large. would the Congress be prepared to "find" also that "the costs imposed by the civil justice system on poorer people are particularly acute, since poorer people often lack the resources to bear those costs and to challenge unwarranted lawsuits." Is there a sister bill to S.1185 to provide similar relief for poorer individuals?

2. This bill would limit the ability of citizens and stakeholders, acting as jurors, to discipline rogue corporations through punitive damages. Like Rip Van Winkle, I wonder if I've been in a 20-year sleep while something occurred in society to suggest that such discipline is no longer necessary? Or is this committee, perhaps, committed to adoption of strong measures that would reform the corporate system and restore corporations to their original public purpose?
3. Section 103 would require victims to prove "willful misconduct or conscious, flagrant indifference to the rights or safety of others." So producers of, perhaps, a vaccine that resulted in brain damage to children would be exempted from punitive damages if they were only casually indifferent or unconsciously indifferent?

2. Sec. 103 (b) (1) may be well-intentioned, but, based on my experience in and with corporations and their decision-making apparatuses, it fails to take into account the motivational factors that inspire business decisions. This section would provide more than a license to do harm; it would practically call to the business manager: "(a) Make a calculation of the cost of insuring a safe product through inspection, testing, and production design. (b) Compare that to the expected value of actual damages likely to be awarded multiplied by 4 (to cover actual damages and punitive damages equal to three times actual damages), taking into account the chain of probability multiplications that result in the final expected value; and be sure to discount this estimate to its present value. If (a) is greater than (b), reject the safety precautions and let the customer pay the price, in health and life."

SCENARIO

— XYZ Corporation, 24 employees, current annual sales $70 million, annual profits about $10 million, total assets $80 million, net worth $30 million

— Product: juice sold in glass bottles

— Lawsuit alleging that glass chips from juice bottles ingested by victims, producing damage and sometimes perforations in stomach or intestine. Bottling machinery chips bottle rims. Company has been in court several times over this, but despite its claims that the machinery has been adjusted the problem keeps occurring. Company accountant, subpoenaed by plaintiff, acknowledges following scenario:

CEO: I see we've lost another case involving glass chips in our bottles. Where are we on that?

Mfg. mgr.: Still where we were. The only way we're going to eliminate that problem is to spend $3 million to retrofit our bottle-handling machines; the ones we're using are getting worn out.

CEO: $3 million is a lot of money. If we can stay with the present machinery awhile, I project we'll get an attractive takeover bid within 5 years.

Mfg. mgr.: We can keep it going for 5 years pretty easily, but there'll be more of those product liability suits.

Legal counsel: Probably one a year.

Accountant: As you requested, boss, I've worked up some numbers on this, assuming one lawsuit a year, 5 in 5 years.

— Probability of case going to trial, not being dropped or dismissed: 20 per cent

— Probability of losing a case that goes to trial: 50 per cent

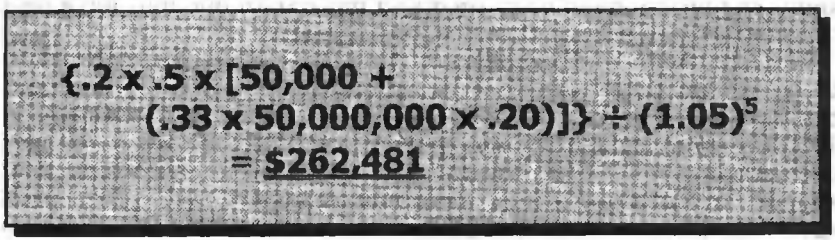
— Expected value of actual damages assessed when we lose a case: $50,000

— Because of our so-called recidivism juries are getting more prone to hit us with punitive damages—say once in every three cases, with an expected value of: $50,000,000

— Of course we appeal all punitive damages, and they are invariably knocked way down, with a final expected value of: 20 per cent

— Figure it takes about 5 years from the time an incident occurs until a case is concluded, appealed, a final decision is rendered, and we have to write a check. In the meantime our money is earning us an ROI of: 10 per cent

So how does this all calculate out?



CEO: Then it's no contest. $3 million to fix the problem vs. $262,481 in discounted present expected value from continuing with business as usual. We will not change the machinery. This meeting is adjourned.

The caps proposed in this bill would be a bonus, a lagniappe, but would not affect the corporate decision to expose customers to potentially serious internal injury.

And throughout this calculus, there is never a figure for the harm, the pain, the suffering, of this company's victims.

When corporations, large or small, use such cold-blooded calculations to sacrifice human health and safety, even life, on the altar of the bottom line, the people's representatives should not tip the scales even further toward soulless corporations and away from the stakeholders who are affected by corporate actions. This bill speaks for business, small business today and surely large business tomorrow. But who speaks for the people? Who speaks for the business stakeholders, the victims of business abuses? If Congress elevates businesses over the people, then where should the people turn to. If Congress will not listen, what would you propose—what would you expect—a fed-up public to do?

Mr. HYDE. Thank you, Professor. Mr. Geiger.

STATEMENT OF ROGER R. GEIGER, STATE EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OHIO

Mr. GEIGER. Mr. Chairman, distinguished members of the Judiciary Committee, I am Roger Geiger, state director of the Ohio chapter of the National Federation of Independent Businesses. Thank you for this opportunity to come before you as a strong proponent of H.R. 2366.

Mr. Chairman, with more than 36,000 members in Ohio, I have seen firsthand how the current legal system can and does hurt small business. Lawsuit filings have tripled in the last 30 years. In State courts, where most civil litigation occurs, more than 18 million lawsuits currently pend. In Ohio, 1,229 civil liability cases were filed in 1 year alone, an average of 86 cases for every day of the year, one every 17 minutes.

Mr. Chairman, there is a problem. Our members are telling us that being sued is one of the most terrifying experiences that a small business can have. It is even more frightening for the smallest of small businesses who fear being put out of business simply because of one lawsuit, as you have already heard today.

I submitted for the record several stories that clearly illustrate the devastating burden frivolous lawsuits place on small business owners.

FIB of Ohio recently conducted a poll of more than 1200 small business owners to determine the effects of lawsuits. Two of the most alarming responses of that survey showed that one in three

small businesses have been sued and more than one-half have been threatened with a lawsuit in the past 5 years.

Mr. Chairman and members of this committee, I simply refuse to accept that we have that many bad actors in the Ohio small business community. Yes, Mr. Chairman, there is a problem. In 1996 the Ohio legislature and the Governor agreed that its citizens needed some relief from the current legal system. With bipartisan support, one of the Nation's most comprehensive tort reform packages was passed. However, just 1 month ago the Ohio Supreme Court by a 4 to 3 vote ruled the law unconstitutional. It is important to note, however, that the court's rulings were based on procedural issues and not on constitutional merit.

As devastating as that was to the small businesses of Ohio, it is not the first time that State tort reform statutes have been struck down by State supreme courts. It was the 90th time, 90 laws passed to provide relief and 90 laws struck down leaving small businesses to struggle with the status quo.

That is why the reforms embodied in House Bill 2366 are so important. They provide relief for the smallest of small businesses across the Nation, ensuring that the law treats defendants fairly and reasonably. While some of the opponents of this bill may argue that H.R. 2366 preempts States' action, I believe that 90 overturned State statutes clearly make an argument for reform at the Federal level.

H.R. 2366 places caps on punitive damages on small businesses with fewer than 25 employees. In our criminal and regulatory systems, an attempt is always made to link the severity of the wrong to a reasonable level of restitution. However, in our civil justice system there is often no rhyme or reason to the amount awarded. They can swing dramatically from court jurisdiction to court jurisdiction.

If we give juries limits in the criminal system, we certainly must be able to do it in the civil system. H.R. 2366 also abolishes joint and several liability for noneconomic damages. This fairness doctrine will provide sensible protection for those who may be as little as 1 percent at fault, but because they have the deep pockets find themselves 100 percent liable for damages. Small business owners are often dragged into lawsuits for which they had little or nothing to do with simply because they are an easily identifiable target. Personal injury lawyers consider small businesses with liability insurance as a means with which to get to the deep pockets of insurance companies. Under the provisions of this legislation, you would be turning us into a civil justice system truly based on degree of fault.

What I am hearing from our members in Ohio is no different from what I hear from my colleagues in other States. We have a legal system that must be reformed at the Federal level for the benefit of small businesses nationwide. The civil justice system must be made fair for the thousands of small business owners in each of your districts by limiting punitive damages and abolishing joint and several liability for noneconomic damages, a very important distinction between economic and noneconomic damages.

I find it always interesting that the opponents of this legislation tend to cloud over the differences between noneconomic, economic damages and punitive damages.

I appreciate the opportunity, Mr. Chairman, to appear before this committee. It would be happy to try to answer any of your questions.

[The prepared statement of Mr. Geiger follows:]

PREPARED STATEMENT OF ROGER R. GEIGER, STATE EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OHIO

SUMMARY

Mr. Chairman and distinguished members of the Judiciary Committee, I am Roger Geiger, state director for the Ohio Chapter of the National Federation of Independent Business (NFIB/Ohio). Thank you for this opportunity to come before you today as a proponent of HR 2366, the Small Business Liability Reform Act.

With more than 34,000 members, NFIB/Ohio is the state's largest association dedicated exclusively to the interests of small and independent business owners. The businesses of our members are truly diverse in scope, ranging from construction to manufacturing, retail to transportation and professional services to agriculture. Our typical member has fewer than ten employees and records annual gross sales of less than $250,000.

In 1996, the State of Ohio agreed that its citizens needed some relief from the current legal system. The Legislature passed and Governor Voinvich signed a law that addressed many of the problems facing small businesses. However, just one month ago, the Ohio State Supreme Court ruled the law unconstitutional and struck it from the state books.

That is why the reforms embodied in HR 2366 are so important. They provide relief for the smallest of small businesses across the nation, ensuring that the law treats defendants fairly and reasonably. While some opponents of this bill may argue that HR 2366 preempts actions of the states, I believe that ninety overturned state statutes make the argument for tort reform at the federal level.

That is why NFIB supports HR 2366. Among other reforms, the bill places limits on punitive damage awards and abolishes joint and several liability. Above all else, these are the two reforms our members have demanded for years.

HR 2366 caps punitive damages at the lesser of three times compensatory damages or $250,000 for small businesses with fewer than 25 employees. In our criminal and regulatory systems of punishment, an attempt is always made to link the severity of the wrong to a reasonable level of restitution. In our civil justice system, there is often no rhyme or reason to the amounts awarded, and they swing dramatically from court jurisdiction to court jurisdiction. Nearly 89 percent of Ohio members and 93% of members nationwide support placing limits on punitive awards.

HR 2366 also abolishes joint and several liability, which ensures that a "guilty" party's financial liability is proportionate to their degree of fault. This fairness doctrine will provide sensible protection to those who may be as little as one percent at fault but, because they have the "deep pockets," find themselves paying 100 percent of the award.

I appreciate this opportunity to appear before this committee in support of HR 2366 and would be happy to answer any questions you may have.

Mr. Chairman and distinguished members of the Judiciary Committee, I am Roger Geiger, state director for the Ohio Chapter of the National Federation of Independent Business (NFIB/Ohio). Thank you for this opportunity to come before you today as a proponent of HR 2366, the Small Business Liability Reform Act.

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I have been the NFIB/Ohio state director for more than 10 years, during which I have seen firsthand how the current legal system can hurt small businesses. While civil litigation was once a last resort remedy to settle limited disputes and quarrels, recent years have brought a litigation frenzy. Lawsuit filings have tripled in the last 30 years. In state courts, where most civil litigation occurs, more than 18 million lawsuits are currently pending, up over 30 percent from just six years ago. In Ohio,

31,229 civil liability cases were filed in state courts in one year—an average of 86 cases for every day of the year, or one every 17 minutes!

Our members tell us that being sued is one of the most terrifying experiences a small business owner can have. It is even more frightening for the smallest of the small businesses who fear being put out of business for good with one lawsuit.

One of my members, a small Athens county restaurant owner, told me that he settles an average of 10–12 claims a year from people who accidentally "trip" in his parking lot. The average cost per settlement is $5,000—that cost represents a lot of hamburgers he has to sell. I recently talked to the owner of a small Columbus based manufacturer who had to spend $56,000 to prove to a jury that he did not even manufacture the product that resulted in a personal injury lawsuit. Yet another of our Ohio small business owners has been sued 59 times. Only once did a jury decide that the businessman should pay an award, but he has had to spend more than $2 million defending himself and his business. Today, you will hear from David Harker, whose story, like these, will certainly highlight the need for the reforms embodied in HR 2366.

After hearing about the difficulties our members were having with the legal system, NFIB/Ohio joined with the Ohio Chamber of Commerce to conduct a poll of more than 1,200 of our members to determine the effects of lawsuits on Ohio's small employers. The results clearly show that enacting reform of the civil justice system is a priority for small business. More than 86 percent of those surveyed said that legal liability concerns affect their business. More than half of Ohio's small businesses have had to raise the cost of products and services because of liability concerns—a cost we as consumers have to pay.

One of the most alarming responses from the survey showed that in the past five years, 35 percent, or one in three, small businesses have been sued; nearly half of those have been sued more than two times. In addition, the survey showed that more than half (56.8 percent) of the small businesses in Ohio have been threatened with a lawsuit in the last five years, and more than 57 percent of those have been threatened with a lawsuit more than two times. I simply refuse to accept that we have that many "bad actors" in the Ohio small business community. The only other conclusion that can be drawn is that we have too many lawsuits being threatened and filed against small business owners.

Your typical main street business operates every day in fear of a lawsuit that could potentially cause them to shut their doors. That makes sense, considering that a $250,000 law-suit against a small business owner would force 59.1 percent of Ohio's small employers *to go out of business*. The message is simple: small businesses do not have the deep pockets to bear such a burden.

In 1996, the State of Ohio agreed that its citizens needed some relief from the current legal system. The Legislature passed and Governor Voinvich signed a law that addressed many of the problems facing small businesses. However, just one month ago, the Ohio State Supreme Court ruled the law unconstitutional and struck it from the state books. As devastating as that was to the small businesses of Ohio, it was not the first time that a state tort reform statute had been struck down by its Supreme Court—it was the 90th time. Ninety laws passed to provide relief; ninety laws struck down, leaving businesses to struggle with current law.

That is why the reforms embodied in HR 2366 are so important. They provide relief for the smallest of small businesses across the nation, ensuring that the law treats defendants fairly and reasonably. While some opponents of this bill may argue that HR 2366 preempts actions of the states, I believe that ninety overturned state statutes make the argument for tort reform at the federal level.

That is why NFIB supports HR 2366. Among other reforms, the bill places limits on punitive damage awards and abolishes joint and several liability. Above all else, these are the two reforms our members have demanded for years.

HR 2366 caps punitive damages at the lesser of three times compensatory damages or $250,000 for small businesses with fewer than 25 employees. In our criminal and regulatory systems of punishment, an attempt is always made to link the severity of the wrong to a reasonable level of restitution. In our civil justice system, there is often no rhyme or reason to the amounts awarded, and they swing dramatically from court jurisdiction to court jurisdiction. Nearly 89 percent of Ohio NFIB members and 93% of members nationwide support placing limits on punitive awards.

In a free enterprise economic system, predictability and stability in the costs associated with manufacturing a product or providing a service are critical elements in order to remain competitive. A restaurant simply cannot absorb the potential of a multi-million dollar punitive damage award in the 65 cents it sells a cup of coffee for. Caps on punitive damages provide some certainty for small business owners by protecting them against lottery-sized damage awards.

The average cost of civil litigation in Ohio is $50,000 per case. Because most small business owners are unable to afford a defense, many will settle even the most frivolous claims simply because they can't afford not to. Even if they CAN afford to go to court, many don't because they fear being hit with a huge punitive damage award. Limiting punitive damage awards ensures that small businesses will not be preyed on for easy settlements.

HR 2366 also abolishes joint and several liability, which ensures that a "guilty" party's financial liability is proportionate to their degree of fault. This fairness doctrine will provide sensible protection to those who may be as little as one percent at fault but, because they have the "deep pockets," find themselves paying 100 percent of the award. Small business owners are often dragged into lawsuits for which they had little or nothing to do with, simply because they are an easily identifiable target. Personal injury lawyers consider small businesses, with liability insurance, as the means through which to get at the "deep pockets" insurance company. Under the provisions of this legislation, you would be returning us to a civil justice system that is fault based, that is, being liable for only the percentage of fault, not for the amount of available funds. More than 81 percent of NFIB's 600,000 small business owner members agree that the law should be reformed to establish a proportionate standard of liability.

What I am hearing from our members in Ohio is no different than what my colleagues are hearing in other states. We have a legal system that must be reformed—at the federal level—for the benefit of small business owners nationwide. The system must be made more fair by limiting punitive damages and abolishing joint and several liability. And we should do it now.

I appreciate this opportunity to appear before this committee in support of HR 2366 and would be happy to answer any questions you may have.

Thank you.

Mr. HYDE. Thank you very much, Mr. Geiger. We will now move to the question period. The chair recognizes Mr. Conyers.

Mr. CONYERS. I thank the panelists. Mr. Bantle, the one way preemption has been touched upon by yourself and Mr. Middleton, we are here preempting the laws of those States that offer greater consumer protections but not those that offer lesser. Where is the element of fairness or how do we introduce it into this part of the bill assuming we wanted to improve Mr. Rogan's legislative efforts here?

Mr. BANTLE. One could strike that preemption language, which is extraordinary in my experience in that it is very blunt, that if the State's provisions are more protective of small businesses they are not preempted. But, frankly, the limits in the bill are very draconian. As I have mentioned, for example, punitive damages in 43 States would be preempted in the anti-consumer direction. I don't think that a change to total preemption of all State law would improve the bill very much.

Mr. CONYERS. Mr. Middleton, what do you think about the whole idea of this overemphasis on punitive damages? You have pointed out that it really only affects a small amount of the litigation.

Mr. MIDDLETON. It only affects, Mr. Congressman, the smallest number of cases. There are only 335 or 353 punitive damages verdicts in 25 years from 1965 forward.

I can tell you the Georgia experience. We passed State tort reform. The great bulk of it was held to be unconstitutional as an infringement on our citizens' rights in Georgia. We still have a punitive damages statue that allows 75 percent of the award that is ultimately paid to go to the State. Since that was passed in 1987, only one punitive damage award has ever come into play for that statute.

It just doesn't happen. In my own personal experience, I have been doing this for almost 22 years now, and I can tell you that

I only received four punitive damage awards. One was in an asbestos case, one was in a legal malpractice case where the lawyer actually stole the client's money that he received in a settlement, and two others involved drunk drivers. So you see the cases of most egregious conduct only, never in frivolous cases or cases considered by the proponents of this bill to be abusive cases.

Mr. CONYERS. But the court usually reviews punitive damages very carefully. I always hear about it being reduced even after the jury makes the award.

Mr. MIDDLETON. They are built into the system, both the trial court level through procedural devices and through the discretionary powers of the court and the power to reduce the awards and also to have them reviewed and reduced through various appellate levels as well.

Mr. CONYERS. Thank you. I want to make Mr. Dinger feel a little bit better in his travels. Small business is doing better than ever. I have lots of small businesses in my area. They are doing better than ever and there is a decline in litigation. We want to examine some of the problems.

Yes, they are—this is a fact that they are, the small businesses are more numerous and more successful. As a matter of fact, that is what the economy is based on, the creation of jobs and economic turnover by them.

I was going to ask Mr. Estes, Dr. Estes, about this hypothetical, but I am running out of time. I apologize. Maybe we can get it in on another round, but Mr. Harker, I have unfortunate news for you. Even if this bill was passed, it wouldn't affect your lawsuit. It is too little.

Ms. Faulkner, the place to start with changing the vicarious liability law is in the capital of New York where you reside, Albany. Let's see what your fellow citizens say about the change that you would impose upon the whole Nation.

Ms. FAULKNER. Can I just answer that a little bit, Mr. Conyers?

Mr. CONYERS. Sure.

Ms. FAULKNER. We just don't—you rent the cars in New York but there is interstate commerce. It does go from State to State and people do have accidents with New York cars in other States. So it does come to Congress when—there is a basis for——

Mr. CONYERS. You would be subject to other States' laws. There are very few States that have New York laws. You would be happy if you have to have this tragedy, have it in some place other than New York. But that is what your fellow citizens have already decreed in your State. You are coming here and asking us to change what the State legislature of New York has imposed by the rule of your fellow citizens.

Mr. HYDE. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I would like the representatives from the business community representing men and women all across America who engage in productive commercial—let me know if you are just making this stuff up. You have heard the lawyers and those that are against reform. They say there is no problem, there are no lawsuits that result in punitive damages, or if there are they are minuscule. Is that really the only problem that we are facing here? Are you making this stuff up?

Mr. DINGER. Mr. Congressman, in reply, I would say at our chamber of commerce meetings, probably the things that come up most is people are afraid; not so much of the lawsuits coming down the pike, but the threat of the lawsuits. No, people are not making them up. They are very real. It does hamper business. It hampers the growth of business and that is one of the largest concerns of our chamber of commerce.

Mr. HARKER. In response to Mr. Conyers' comment on limits, the limit on this particular case was very arbitrarily picked. They could have been suing me for a million dollars. In this particular case they only chose $100,000.

Also on some of the statistics that I have heard today, I personally have never been aware of any insurance rates ever going down for anything in my business. My rates increase every single year like clockwork.

Mr. BARR. Thank you. Mr. Middleton, I am not implying that you are saying something incorrectly at all. It is only, that you would agree to be fair, that it is one part of the problem that you are looking at by sort of zeroing in with microscopic vision just that the cases that in your experience or in your scope of knowledge actually result in significant punitive damage. But I would think that you would certainly agree and I think this would help the credibility of your case, rather than just keep saying over and over again that there are no punitive or very, very few punitive damage cases that result in actual significant damages. You have to recognize that there are a lot of cases that are filed that have an impact. They may be dismissed or settled. There are a lot of cases that are threatened that are not filed yet that result in some damage or some cost to businesses.

Would you not at least agree to help us look at the whole picture here and reach an informed decision that there is somewhat more to it and some credibility to what the businesses are saying over and above simply those cases that go through the entire system and result in actual punitive damages?

Mr. MIDDLETON. If I might, Mr. Congressman, with regards to what is being proposed, the truth is this bill doesn't stop——

Mr. BARR. Would you at least agree with the general statement that I made, that there is more to it than simply what you want us to focus on?

Mr. MIDDLETON. There are many factors. I would agree with that so far as it goes, Mr. Congressman. In addition to that, this bill does not prevent anyone from making threats against businesses, nor does the testimony of the business community admit, as the statistics from the National State Court Association and other groups that have studied this, that more than half of the civil cases are filed business versus business. They are not consumers versus business.

In many cases where there are awards, the case that I know you are familiar with from Georgia involving the stockholders of Time Warner where punitive damages were assessed, that was a business case involving Six Flags Over Georgia.

If I might add this, with regards to the statement about insurance premiums, in our own State of Georgia, we knew and we heard the same mantra that this would help premiums go down,

but we know from the no fault situation where we repealed no fault after 16 years, the premiums by the insurance industry never went down until we went back to a complete fault based system, complete fault base and got rid of all no fault concepts.

Mr. BARR. Thank you.

Mr. HYDE. The gentleman from Tennessee.

Mr. JENKINS. Thank you, Mr. Chairman. Let me just continue the point that Mr. Barr was making and that Mr. Harker made earlier about insurance rates and ask Mr. Dinger, who represents the Insurance Agents of America. You heard what the gentleman said about his own liability insurance rates. If we pass this law, are you going to be able to assure Mr. Harker, Ms. Faulkner, the others who have testified, Mr. Keeley here, that their liability insurance rates are going to go down?

Mr. DINGER. Well, once again, I am an agent, not an actuary. But claims are based on—premiums are based on claims, payments, actual. Also based on historical trends and returns on investments. Also competition.

I think with the predictability and consistency, that this bill would help reduce rates in the future for our clients which I am an advocate for. I try to help my clients as much as possible to keep them in business.

Mr. JENKINS. But you are not going to be able to give us any guarantee that they are going to be able to reduce their rates? Which should logically, if your testimony is correct, be a corresponding result, should it not?

Mr. DINGER. As an agent, I would say it would be a corresponding result, so——

Mr. JENKINS. Now, in the case that you cited, I guess that was one of your insureds, the shopper's brother who was hurt on the motorcycle. There was absolutely no liability on your insured, on the dealer in that case. Is that correct?

Mr. DINGER. He was not an insured. He was a chamber of commerce member. He was not cited for liability. It was settled out of court, but he was brought in on the depositions. As a small business owner and not a lawyer, he was concerned for his business throughout the entire event.

Mr. JENKINS. It didn't cost him any money and he came out all right? The system did work in his case?

Mr. DINGER. He said he spent 100 hours testifying and putting this case together for the lawyers which took away his time from running his business. So it probably did cost him financially.

Mr. JENKINS. Do you know in California if you have a rule in your civil rules of procedure that would allow a judge to award him compensation for his time if the actions that were filed against him were absolutely frivolous?

Mr. DINGER. I am not an attorney.

Mr. JENKINS. Okay. You would imagine that if California is like the other States in the Union, that there is such a provision in the civil rules of procedure?

Mr. DINGER. That is not my area——

Mr. JENKINS. At any rate, in your case you have not given us an example where some citizen has been unjustly put upon by our legal system?

Mr. DINGER. I am giving you an example of a small business owner who was brought through the ringer in this situation and—how can he be responsible for the 10,000 parts that he stores in his store? He doesn't know. Why should he be brought forth——

Mr. JENKINS. I thought that you said he wasn't liable.

Mr. DINGER. He was sued. He was brought in front of the court.

Mr. JENKINS. Let me ask Ms. Faulkner. The outcome of the lawsuit, you didn't tell us what the outcome of the lawsuit that you cited was. Is that one concluded?

Ms. FAULKNER. Mr. Jenkins, I don't have information to that. When I sold my assets, I sold my liability. I have to apologize to you.

Mr. JENKINS. You cited it here as an example of where the system was out of kilter, did you not?

Ms. FAULKNER. Yes, sir.

Mr. JENKINS. How are you going to cite that as an example of a system out of kilter if you don't know what the outcome of it was?

Ms. FAULKNER. Mr. Jenkins, I can cite a lot of things in the vicarious liability for car rental that is out of kilter. There are many instances where I have been liable for damages that were not my responsibility. That was my main thrust, not the fact that it was a financial loss to me but a potential consistent loss to me to be concerned that I would be held responsible for something I did not do.

Mr. HYDE. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I apologize for being late. There was a hearing on the subcommittee of this committee meeting at the same time. I hope that we can bring the schedule a little better in the future.

Mr. Middleton, when you don't have joint and several liability, who has the burden of proof to prove each person's portion of the liability?

Mr. MIDDLETON. The way that it is now, the plaintiff has joint and several liability. And if the defendant wants to bring in some other party and have the jury assess harm—first of all, they have the ability to do so in a third party complaint within the case. Secondly, if someone else is found to be also at fault, they can bring a contribution action if any verdict is later rendered against them, against any parties they believe to be offending parties and a proximate cause of the harm that they paid for.

Mr. SCOTT. That is in the present law. But if you don't have joint and several liability, who has to prove who did what portion of the damage?

Mr. MIDDLETON. It is up to the plaintiff to prove the case.

Mr. SCOTT. Now, if one defendant says I was only 10 percent at fault and the plaintiff thinks they were 50 percent at fault, it would be the plaintiff to have to prove that portion of the damage?

Mr. MIDDLETON. Under this proposal, the burden for the plaintiff is dramatically increased, sir.

Mr. SCOTT. Since all of the information is held by the defendants, how would the plaintiff ever know who did what to who? All they know is they got hurt and it was their fault.

Mr. MIDDLETON. This was a point that I made in my prepared testimony, sir, that indeed this will increase litigation rather than decrease it because it increases the work that the plaintiff has to resort to in order to try to figure out who is responsible. In addition, if you can point at an empty chair to be the proximate cause and if you lose the ability to ask that someone should be compensated if someone has a weak link in the chain and it is a proximate cause, then you force the plaintiff to bring more people in initially. He has got to look at the vast spectrum of potential defendants in order to hold the statute of limitations against those entities and also to pursue a claim because the jury may assist an empty chair and then anybody that gets an award is undercompensated because that party isn't at the table.

Mr. SCOTT. And if you settled with somebody because you thought they were 10 percent at fault and they become an empty chair and everybody really says, well, they were really 50 percent at fault, the plaintiff just loses that money and therefore has a disincentive to settle at all?

Mr. MIDDLETON. That is correct.

Mr. SCOTT. I think Mr. Conyers, as I understand it, has talked about the problem with the cap on punitive damages at $250,000. As I understand it, the bill provides this exemption for a business of under 24 people, but doesn't have any relationship with the amount of revenues that the 24 people are generating. In fact, if they have ripped people off to the tune of a billion dollars, would they not be entitled to this limitation on punitive damages?

Mr. MIDDLETON. The defendant would be entitled to the limitations. I again give the example of a legal malpractice claim for a 10-person law firm where some lawyer does something completely egregious and a small business client loses the benefit of that legal work that he entrusted to that attorney. I don't think we would ever want to limit what damages could be brought against any professional.

Mr. SCOTT. Have we established a need for that limitation? Are there so many punitive damage awards going around that you need a limitation of $250,000?

Mr. MIDDLETON. No. Indeed, there are very few punitive damages. Less than 350 in the last 25 years have ever even come out of a trial court, much less been considered on appeal, many of which were reduced by the way or completely reversed.

Mr. SCOTT. How much of these were under 250,000? How much punitive damages awards have been over $250,000 and therefore would be affected by the legislation?

Mr. MIDDLETON. It is such a minuscule amount. The importance is that not only is the amount of the damage award—excuse me, the number of cases small, but in those cases where they are a good bit over $250,000, it is generally considered by juries and judges, as we recently have seen, to be as a result of such egregious conduct that they must serve as a deterrent to prevent not only that defendant but other potential defendants in the future from resorting to that type of conduct that results in that level of harm.

Mr. HYDE. Mr. Rogan, the gentleman from California.

Mr. ROGAN. Mr. Chairman, thank you. I agree with Mr. Middleton in his opening statement that there is a good deal of inflam-

matory rhetoric that gets bandied about in this type of hearing. The temptation on both sides is always to resort to legislation of stories of abuse on one side or the other. I am doing my best to try to avoid that.

I had the opportunity to both listen to Mr. Bantle and also to read his opening statement. I appreciated his concerns about misbehaving scofflaws going scot-free and wrongdoers not being held unaccountable. I just want to assure all of the witnesses preliminarily that is certainly not the intent of this bill to protect any such people. I have to also acknowledge from Professor Estes there was a good deal of sneering about big corporations taking advantage of this to the extent of hurting the little guy. In fact, in reading his testimony there is reference to rogue corporations. There is reference to corporations, large or small, using cold blooded calculations to sacrifice human health and safety, even life, and that we should not tip the scales even further toward soulless corporations.

Professor Estes raises the question, who speaks for the people? If Congress elevates businesses over the people, where should the people turn?

Professor Estes, small businesses are made up of people, aren't they?

Mr. ESTES. Yes.

Mr. ROGAN. There is no large corporate liability built into this bill, is there?

Mr. ESTES. I am not sure what you are referring to, Congressman.

Mr. ROGAN. Any business, whether it is a corporation or not, whether it has 25 or more employees, they get no relief under this bill, do they?

Mr. ESTES. As another witness has testified, the number of employees is not a determinant of the amount of damage that may be done. The damage may indeed be large and the amount of revenue of the corporation may indeed be very large.

Mr. ROGAN. General Motors, IBM, Ford Motor Company, none of those corporations would come under the purview of this bill, correct?

Mr. ESTES. Per my understanding, that is correct.

Mr. ROGAN. As a matter of fact, when we are dealing with a products liability case where a seller has committed some type of wrong and caused an injury—strike that, where the manufacturer has created some type of liability situation and caused an injury, if it was a soulless corporation that put the bottom line above doing the right corporate thing, they could be fully sued under this bill, correct?

Mr. ESTES. Who do you refer to when you say "they"?

Mr. ROGAN. The manufacturer, the corporation or noncorporation.

Mr. ESTES. Who pays the penalty?

Mr. ROGAN. There is no limitation for the manufacturer of a faulty product in this bill, is there, with respect to product liability?

Mr. ESTES. Isn't that what the $250,000 limitation applies to?

Mr. ROGAN. Talking about title II, the product liability aspect that you addressed in your testimony, it relates to sellers. It doesn't relate to the manufacturer.

Mr. MIDDLETON. This was a point that I m
testimony, sir, that indeed this will increase
decrease it because it increases the work th
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Mr. MIDDLETON. Tha

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seller liability or importer liability, distributor liability,
it provides a disincentive for people engaged in that prac-
could only stand in the position of the manufacturer if the
manufacturer could somehow not otherwise be gotten.

Mr. ROGAN. As a matter of fact, just on that point if the manu-
facturer is judgment proof or can't be served, this bill doesn't pro-
tect the seller, does it?

Mr. MIDDLETON. Under the bill—and I brought this up in my
prepared testimony, and that is this: The statute of limitations for
the seller is only tolled until a judgment is reached at the trial
court level. If then appeals are taken and if the manufacturer then
goes belly up, during the appellate process and the statute which
is no longer tolled runs, then the person who our system is set up
to compensate, the victim, has no cause of action at all because he
couldn't bring in the seller ahead of time if the manufacturer was
there.

Mr. ROGAN. But there is no immunity, is there? There is no im-
munity for the seller if the manufacturer is judgment proof under
this?

Mr. MIDDLETON. It depends when the manufacturer goes judg-
ment proof. This bill doesn't correct that problem. In fact, it creates
the loophole that any manufacturer could walk through by filing
for chapter 11.

Mr. ROGAN. Mr. Chairman, I see my time has expired. Thank
you.

Mr. HYDE. Well, all time has expired. And because of the hour
we will adjourn, but I want to thank all of you. You have made a
contribution to a complicated issue and one that will bear our close
study and have an impact on the ultimate result. So I thank you
so much.

The committee stands adjourned.

[Whereupon, at 12:

ENDIX

HE HEARING RECORD

ONAL ASSOCIATION OF
MANUFACTURERS (NAM),
n, DC, September 28, 1999.

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Mr. ESTES. I was talking about title I.

Mr. ROGAN. Let's go back to title I. If a small business is involved in this, they are fully liable for economic loss, correct?

Mr. ESTES. I assume so. This addresses limitations on punitive damages. We get confused between punitive and economic damages.

Mr. ROGAN. I don't want to confuse anybody. I am certainly not in a position to confuse a professor. I tried to in law school, and I never succeeded.

Let's go back to product liability for a minute. This bill doesn't protect the manufacturer, it only deals with what could be an innocent seller. That is correct, isn't it?

Mr. ESTES. Congressman, my testimony related to title I. I wasn't addressing title II.

Mr. ROGAN. Mr. Middleton, let's just talk about that for a minute. It doesn't relate to the manufacturer, does it? It relates to the seller.

Mr. MIDDLETON. It relates to the manufacturer if they have less than 25 employees. But let me tell you who else it relates to, that is the foreign importer of defective products manufactured in a country with no controls over what they do at all. My written testimony includes cases involving the importation of basically illegal fireworks and the deaths that that company caused. And so when you look at seller liability or importer liability, distributor liability, certainly it provides a disincentive for people engaged in that practice who could only stand in the position of the manufacturer if the manufacturer could somehow not otherwise be gotten.

Mr. ROGAN. As a matter of fact, just on that point if the manufacturer is judgment proof or can't be served, this bill doesn't protect the seller, does it?

Mr. MIDDLETON. Under the bill—and I brought this up in my prepared testimony, and that is this: The statute of limitations for the seller is only tolled until a judgment is reached at the trial court level. If then appeals are taken and if the manufacturer then goes belly up, during the appellate process and the statute which is no longer tolled runs, then the person who our system is set up to compensate, the victim, has no cause of action at all because he couldn't bring in the seller ahead of time if the manufacturer was there.

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Mr. ROGAN. Mr. Chairman, I see my time has expired. Thank you.

Mr. HYDE. Well, all time has expired. And because of the hour we will adjourn, but I want to thank all of you. You have made a contribution to a complicated issue and one that will bear our close study and have an impact on the ultimate result. So I thank you so much.

The committee stands adjourned.

[Whereupon, at 12:29 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

NATIONAL ASSOCIATION OF
MANUFACTURERS (NAM),
Washington, DC, September 28, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the National Association of Manufacturers, thank you for holding the September 29 hearing on H.R. 2366, the Small Business Liability Reform Act. The NAM, which has more than 10,000 small and medium manufacturers among its 14,000 member companies, strongly supports enactment of H.R. 2366 and asks that you include this letter in the hearing record.

H.R. 2366 includes reasonable reforms to the civil justice system that will help small businesses escape from lawsuits that are not based on merit. It would establish a uniform standard for punitive damages of clear and convincing evidence of egregious misconduct. In addition, punitive damages awards would be limited to the lessor of $250,000 or three times the amount of compensatory damages. For a small business, defined in the bill as employing fewer than 25 full-time workers, a damages award of anything more than $250,000 is, effectively, a "death penalty." Also, under the bill, small businesses would be liable only for their "fair share" of non-economic damages.

Finally, the Small Business Liability Reform Act also would hold product sellers liable only to the extent that they were directly responsible for the alleged harm or if the plaintiff cannot collect from the product manufacturer. All too often, product sellers are named in lawsuits solely to allow the plaintiff to file in a friendly venue.

The NAM appreciates your holding this hearing and encourages you and your colleagues to move H.R. 2366 through the legislative process as expeditiously as possible. Thank you for support for this measure.

Sincerely,

MICHAEL E. BARODY, *Senior Vice President.*

ASSOCIATED BUILDERS AND
CONTRACTORS (ABC),
Rosslyn, VA, September 29, 1999.

Hon. JAMES ROGAN,
House of Representatives, Washington, DC.

DEAR REPRESENTATIVE ROGAN: Associated Builders and Contractors' (ABC) 21,000 members have long been supportive of lawsuit reform as a beneficial solution of the pressing problem of frivolous lawsuits which raise the cost of doing business and clog the nation's court systems. ABC lends its strong support to H.R. 2366, the Small Business Lawsuit Abuse Protection Act of 1999. The legislation will help address excessive litigation which is eating away at the United States' entrepreneurial society. We respectfully request that our letter of support be included in the hearing record.

The construction industry provides good, well-paying jobs for over five million American workers every year. The average ABC member-company employs 15–25 employees, and small, open shop companies hire the majority of minority, women and disadvantaged workers. Small businesses, which create the bulk of our nation's jobs desperately need and deserve legal reform legislation.

Under current law, punitive damage verdicts are commonplace as a result of vague substantive standards and unrestrained plaintiffs' lawyers. Awards in non-economic cases compensate plaintiffs for "pain and suffering" or "emotional distress," and are not calculated on tangible economic loss. Multimillion-dollar punitive damage awards are now routinely sought and frequently imposed in almost every type of civil case.

There is also an increasing number of multi-million dollar joint and several liability cases brought against local governments, small businesses, and other insured defendants. Construction industry contractors are at risk of being named in joint and several liability lawsuits under the current legal climate.

The costs to defend these and other frivolous cases that are commonplace in today's litigious society are ultimately passed on to taxpayers and consumers through increased taxes, higher prices for goods and services and increased insurance premiums. Small businesses especially suffer.

ABC specifically supports provisions in H.R. 2366 that cap punitive damages against small businesses with fewer than 25 employees at the lesser of $250,000 or three times compensatory damages, and eliminating joint and several liability for noneconomic damages for small businesses.

ABC supports legislative efforts for legal reforms to ensure that businesses across the country can operate and compete based on fair, flexible and equal opportunities in the marketplace. We commend you on the introduction of and the hearing on the Small Business Lawsuit Abuse Protection Act of 1999.

Sincerely,

ERIKA L. BAUM, *Director, Workplace Policy.*

INTERNATIONAL MASS RETAIL
ASSOCIATION (IMRA),
Washington, DC, September 28, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Please find enclosed an original and four copies of the International Mass Retail Association's (IMRA) statement on the "Small Business Liability Reform Act of 1999" (H.R. 2366). Please include the statement in the official record for the Committee's September 29 hearing. Thank you for your consideration.

Sincerely,

ROBERT J. VERDISCO, *President, IMRA*

Enclosures

PREPARED STATEMENT OF THE INTERNATIONAL MASS RETAIL ASSOCIATION

The International Mass Retail Association (IRMA) strongly supports H.R. 2366, the "Small Business Liability Reform Act of 1999," sponsored by Representative James Rogan. The bill's second title, "Product Seller Fair Treatment," would create a long-overdue uniform liability standard in almost all Federal or state product liability lawsuits for non-manufacturing distributors, who play no role in an allegedly faulty product's design or manufacture.

IMRA represents the mass retail industry—consumers' first choice for price, value and convenience. Its membership includes the fastest growing retailers in the world—discount department stores, home centers, category dominant specialty discounters, catalog showrooms, dollar stores, warehouse clubs, deep discount drugstores and off-price stores—and the manufacturers who supply them. IMRA retail members operate more than 106,000 American stores and employ millions of workers. One in every ten Americans works in the mass retail industry, and IMRA retail members represent over $411 billion in annual sales.

The bipartisan bill would rightly protect non-manufacturing product sellers from being pulled into product liability lawsuits, unless the harm was caused by a distributor's intentional wrongdoing or failure to exercise reasonable care, or by the product's failure to meet an express warranty made by the seller or distributor. H.R. 2366 would also open retailers/distributors to product liability actions if the product manufacturer is insolvent or beyond the court's jurisdiction.

This narrowly-crafted and carefully-tailored liability standard would halt the abusive practice of dragging retailers and distributors into product liability lawsuits, where the seller/distributor took no part in the design or manufacture of the product in question. All too often, mass retailers and other non-manufacturing distributors

will be drawn into product liability actions, either in an attempt to defeat Federal diversity jurisdiction—for example, to keep a broad-scale class-action lawsuit out of Federal court—or in an attempt to bring in additional defendants who may well have "deeper pockets" than the product maker.

While mass retailers and other product sellers are often able to remove themselves eventually from such lawsuits, and are seldom ultimately found liable in product liability cases, they must bear the legal expenses (outside counsel, administrative and filing costs, staff time, insurance processing, etc.) incurred in investigating and defending such lawsuits.

These needless legal burdens impose a hidden "litigation tax"—unnecessary legal expenses that are unfortunately, but necessarily, passed onto consumers in the form of higher prices in the check-out line—on almost all products. As a result, every consumer winds up paying for unmerited claims and frivolous lawsuits.

H.R. 2366's product seller liability standard would reduce these legal costs for distributors that did not create nor design the product in question by justly holding such retailers liable only for their own actions, while still allowing plaintiffs to seek recourse against parties most responsible for an alleged product defect.

With the many thousands of products that a typical mass retailer has in a store on any given day, it would be simply impossible to thoroughly inspect each and every product manufactured by another for potential defects. The product's designers and makers are best suited to spot possible product defects, and H.R. 2366 rightly holds them most responsible for any alleged product hazards.

It is important to note that the distributor liability standard in H.R. 2366 is not a recent innovation. It has been a generally non-controversial part of many previous product liability bills that have cleared committee mark-ups and floor votes in previous Congresses. Seller liability provisions were not only included in the broader-scale product liability reform bill which President Clinton vetoed in 1996, but also in the more limited bipartisan compromise later reached between the White House and Congressional sponsors of product liability reform, but which was sidetracked by an unrelated issue.

Whether or not Congress will address broader-ranging product liability concerns, there is no sound reason not to act now on sensible, achievable reforms in the area of retailer/distributor liability.

Product safety is a foremost concern for the nation's mass retailers, who strive to provide consumers with the safest, highest quality products available at the lowest possible price. The shopping values and wide selection that mass retailers provide, however, are jeopardized by unfair, costly litigation against product sellers that did not take part in the product's manufacture.

H.R. 2366's product seller liability standard strikes a fair and balanced approach toward providing innocent retailers with reasonable safeguards against liability for products they played no part in producing, while still allowing consumers to pursue claims they believe meritorious against those most responsible for the product. IMRA strongly endorses H.R. 2366, and urges its speedy passage.

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